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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT, & WM. RAWLE, JUN.

VOL. IX.

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.....
1825.

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D. CALDWELL,

Clerk of the Eastern District of Pennsylvania.

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

WILLIAM TILGHMAN, Esq. Chief Justice.

JOHN B. GIBSON, Esq. }
THOMAS DUNCAN, Esq. } Justices.

ATTORNEY GENERAL.

FREDERICK SMITH, Esq.

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CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM, 1822.

[PITTSBURG, SEPTEMBER 23, 1822.]

The Bank of Pennsylvania *against* LATSHAW.

IN ERROR.

After a *fi. fa.* has been levied upon real property, which has been condemned, the plaintiff cannot abandon these proceedings and take out a *ca. sa.* without the leave of the court.

ON a writ of error to *Allegheny* county, it appeared from the record that the plaintiff below, the Bank of Pennsylvania, levied a *fi. fa.* on the real property of the defendant, and had it condemned. A *venditioni exponas* followed in due course, to which the sheriff returned, "Proceedings on this writ abandoned by order of the plaintiff's attorney." On the same day a *ca. sa.* was issued, on which the defendant was arrested. To obtain his discharge he issued a *habeas corpus*, returnable before Judge WILKINS, who, after hearing the relator, remanded him to the custody of the sheriff.

To reverse this execution, was the object of the present writ of error.

D. S. Walker and *Hopkins* for the plaintiff in error, argued, that a *fi. fa.* having been issued and in part executed, no *ca. sa.* could regularly issue, until the first writ was finally disposed of. 1 *Sell. Pr.* 525. *Young v. Taylor*, 2 *Binn.* 218. In *McCollough v. Guetner*, 1 *Binn.* 214. it was decided, that when an inquest returns that the rents and profits will pay the debt in seven years, the plaintiff cannot, without the leave of the court, abandon his first *fi. fa.* and take out a new one. The levy was *prima facie* proof at least, that the defendant had property, out of which the plaintiff's demand might be satisfied, and it is only in the absence of such

(The Bank of Pennsylvania v. Latshaw.)

means of satisfaction, that the law permits the person to be resorted to. It was not the province of the plaintiffs to decide that the property was so incumbered, as ultimately to make it no satisfaction. If such was their opinion, an application to the court to set aside the levy, would have enabled them to ascertain the fact, and if it had been made to appear so to the court, relief could have been given.

Biddle, for the defendant in error, contended, that on general principles, a plaintiff may abandon one execution and take out another. When a *fi. fa.* has been executed in part, it is only necessary that it should be *returned*, to authorise a second execution. 1 *Sell. Pr.* 535. The case of *M. Collough v. Guetner*, in which the effect of permitting the plaintiff to abandon the proceedings on his first execution, and take out a new one, would have been to deprive the defendant of the benefit of the inquisition by which he was entitled to preserve his land, is not at all analogous to the present case, in which the land was condemned. If the property (as was actually the case here,) be so covered with older judgments, as to make the levy wholly unavailable, are the plaintiff's hands to be tied, until its insufficiency be proved by a sale, or the court be called upon to interfere? The result of such delay would in many cases be the loss of the debt. And who is to judge whether the property affords a sufficient or any security for the debt? Not this court surely, because they have not before them the facts necessary to such an inquiry. If the plaintiffs themselves be not competent alone to decide, they have the sanction of the opinion of the president of the Court of Common Pleas, who on a review of the facts, remanded the defendant to the custody of the sheriff.

GIBSON, J. delivered the opinion of the court.

I think it clear the defendant could not abandon the levy while it remained in force. In delivering the opinion of the court, in *Young v. Taylor*, (2 *Binn.* 218.) it was thought by Mr. Justice YEATES to be highly questionable, whether a plaintiff, after the defendant had been arrested, and discharged on giving security to apply for the benefit of the insolvent laws, could withdraw his *ca. sa.* and issue a *fi. fa.* without the leave of the court. The doubt, I presume, arose from considering the arrest as *satisfaction* till the defendant should be finally discharged; and if it were, the assent of the court would perhaps not be a sufficient sanction for the issuing of a new writ. But in the case before us, such assent is of essential importance. The act of the 13th of April, 1807, declares that no *ca. sa.* shall be issued where the defendant shall have real or personal property to satisfy the debt. Now the return of a levy becomes matter of record which nothing but the judgment of the court can discharge. The plaintiff, at the risque of being answerable for a trespass, in case the defendant should be found to have had property, might have arrested him in the first instance; but where, from

(The Bank of Pennsylvania v. Latshaw.)

his own showing, there is at least *prima facie* evidence of the existence of property, it would be an abuse of the process of the court, to permit him to abandon it, and resort to the person. It is unnecessary to determine whether a levy, while it is undisposed of by any further proceeding or order of the court, is to be considered as a discharge of the debt: while it remains in force, as it must necessarily be, till it is set aside, a *ca. sa.* must appear, on the very face of the proceedings, to be irregular on other grounds; for while the defendant is ostensibly able to make satisfaction by his property, it is the business of the court to see that he be not called on to make satisfaction by his person. The better course here would have been to call on the defendant to show cause why the levy should not be set aside; and if, by reason of prior liens, it had been found altogether worthless as a means of satisfaction, the rule would have been made absolute: after which the *ca. sa.* would have been perfectly regular.

Judgment affirmed and execution reversed.

[PITTSBURG, SEPT. 24, 1822.]

WITHERUP *against* HILL.

IN ERROR.

In support of an action for money had and received, a receipt signed by the defendant for goods deposited in his store by the plaintiff, is evidence.

If there be any thing in the plaintiff's case which entitles him to an exemption from the operation of the act of limitations, he ought, when the act is pleaded, to set it forth in his replication. If he omit to do so, and join issue on the plea, it is incumbent on him to prove an assumption within six years.

THE defendant in error brought an action in the Court of Common Pleas of *Venango* county, against the plaintiff in error, in which he declared for money had and received, &c. The defendant pleaded *non assumpsit* and payment, and *non assumpsit infra sex annos*; to which the plaintiff replied that he did assume within six years; whereupon issue was joined.

The plaintiff offered in evidence on the trial two receipts signed by the defendant, for certain goods deposited by the plaintiff in the defendant's store, one dated *June 12, 1806*, the other *July 7th, 1806*. The defendant objected that the receipts were inadmissible under the pleas put in. The plaintiff answered, that this being a case of trust, the act of limitations did not apply; to which it was replied that the action ought then to have been against the defendant as bailiff, factor, agent or receiver, or in account render.

The court overruled the objection, admitted the evidence, and afterwards charged the jury, that from the nature of the plaintiff's demand, the act of limitations, was no bar to his recovery. The counsel for the defendant excepted to the opinion of the court, both on the question of evidence and in their charge to the jury.

(Witherup v. Hill.)

Selden and Farrelly, for the plaintiff in error.*Forward*, contra.

Per Curiam. This was an action for money had and received, &c. pleas, *non assumpsit*, payment, and statute of limitations, and issues. The plaintiff offered in evidence two receipts signed by the defendant for goods deposited in his store by the plaintiff. This evidence was objected to by the defendant, but admitted by the court. It is our opinion that the evidence was properly admitted. It was the first link in the plaintiff's chain of evidence; having proved the deposit of the goods, he might have gone on to prove that they had been sold by the defendant, and the money received by him, which would have been directly in support of the action. But there was another exception to the charge of the court. The defendant prayed the court to instruct the jury, that if they should find, that the defendant did not make an assumption within six years before the bringing of the suit, their verdict ought to be for the defendant, on the issue of the statute of limitations, but the court charged, "*that from the nature of the plaintiff's demand, the statute of limitations was not a bar.*" In this, we are of opinion, there was error. The plaintiff's demand, was for money received by the defendant for his use, and in his replication to the plea of the statute of limitations, he affirmed that the defendant assumed within six years. The burthen of proof was therefore on him. If there had been any thing particular in his case, which would have exempted it from the statute of limitations, the plaintiff ought to have set it forth in his replication, and not have replied that the defendant did assume within six years. On the issue joined, it was incumbent on the plaintiff to prove an assumption within six years, and failing in that, the verdict ought to have been against him. The judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

[PITTSBURG, SEPT. 27, 1822.]

EMERY *against* NELSON.

IN ERROR.

When a justice of the peace has jurisdiction of a case, his judgment, though erroneous, is binding on the parties until reversed on a *certiorari* or appeal.

THIS was an action of trover for a heifer, brought before a justice of the peace, by *William Nelson*, the defendant in error, against *John Emery*, the plaintiff in error. The magistrate gave judgment in favour of the plaintiff, for 8 dollars, and the defendant appealed to the court of common pleas of *Mercer* county. An action of trover had been previously brought by *Emery* against *Nelson*, for the same heifer, which was submitted to referees, who re-

(Emery v. Nelson.)

ported the sum of 4 dollars in favour of the plaintiff, for which the magistrate before whom the suit was brought, entered judgment.

In order to prove property in the heifer at the commencement of the present suit, the plaintiff produced, on the trial in the common pleas, the record of the trial and judgment in the case of *Emery v. Nelson*, which he contended was conclusive as to the right of property. The defendant contended, that the value of the property in controversy being less than 10 dollars, the award and judgment were irregular and void, and must be treated as nullities.

The court was of opinion, that although the judgment was not perfectly regular, yet as the justice had jurisdiction of the cause of action, and the defendant had acquiesced in it, by omitting to remove it by *certiorari* within a proper time, it must be considered a valid judgment against the defendant. An exception was taken by the defendant to this opinion, and the verdict being for the plaintiff, the cause was removed to this court by writ of error.

Forward, for the plaintiff in error. No consent can give a justice of the peace power to enter a judgment upon an award of referees, if he be not authorised to do so by act of assembly. And there is not only no act which authorises a reference in a case like this, but it is in terms excluded by the 2d section of the act of 22d March, 1814., *Purd. Dig.* 363. This section permits a reference only when the demand in controversy exceeds ten dollars.

Farrelly and Bankes, contra.

A justice of the peace having jurisdiction in cases of trover, where the property in dispute does not exceed 100 dollars, the objection here is not to the jurisdiction, but to the mode of trial. The parties were entitled to try their cause in any manner they pleased, and they chose a reference, which, independently of the act of assembly, would have been good at common law. If parties appear before the justice, and try the cause before the return day of the summons, they are bound by his judgment, *Buckmyer v. Dubs*, 5 *Binn.* 32; and why should they not be bound by this judgment on an award of referees made by consent? There is no difference in principle. But if the judgment was erroneous, it was binding upon the parties until reversed by *certiorari*, or on appeal. *Zeigler v. Zeigler*, 2 *Serg. & Rawle*, 286. *Lewis v. Smith*, 2 *Serg. & Rawle*, 156, 162. The omission to adopt the remedy given by law amounted to a release of errors.

Per. Curiam. *William Nelson*, the plaintiff below, brought this action of trover, for a heifer which had been the subject of another action of trover, brought by the present defendant against him before a justice of the peace, in which there was a recovery against him for four dollars, the value of the heifer. If that was a valid judgment, the property was transferred to the present plaintiff, and whether it was valid was the question on the trial in the court below. It was objected, that the judgment was invalid, because the justice gave judgment in an action of trover, where the pro-

(Emery v. Nelson.)

perty in dispute was of less value than 10 dollars, on the award of certain persons to whom the suit was referred by consent of the parties. The counsel for the defendant contends that the act of 22d March, 1814, gives no power in such case, to enter a judgment on the report of referees. We give no opinion on the regularity of the judgment, but inasmuch as the justice had jurisdiction of the case, we are of opinion that the judgment was not void. It might have been appealed from and removed by *certiorari* to the Court of Common Pleas. But being acquiesced in, by both parties, it is between those parties a valid judgment. That being the case, the property of the heifer was transferred to the present plaintiff, who having proved a demand and refusal, was entitled to a verdict. We are of opinion, therefore, that the judgment should be affirmed.

[PITTSBURG, SEPT. 27, 1822.]

PRATHER *against* CONNELLY.

IN ERROR.

The limitation of six months as to suits against justices of the peace, contained in the 7th section of the act of 21st March, 1772, may be taken advantage of by the justice, though not specially pleaded.

But in a suit against a justice, for not certifying a recognizance, entered into by the plaintiff, in consequence of which the plaintiff's appeal from the judgment of such justice was dismissed, evidence is admissible that the plaintiff tendered bail to the justice, more than six months before the suit against the justice, because, though this was before the six months, the neglect to certify the recognizance may have been within that period.

Writ of error to *Venango* county.

THE defendant in error, *Isaac Connelly*, Esquire, who was also defendant below, was a justice of the peace, before whom the plaintiff in error, *Prather*, had been sued by a certain *William Kinneer*. The judgment of the magistrate being against *Prather*, he appealed to the Court of Common Pleas, who quashed the appeal, because the recognizance of bail was not certified with the transcript of the justices' docket. The present suit was brought against the justice, for neglecting to certify the recognizance of bail. The plaintiff on the trial, offered a witness to prove, that on the 10th or 12th July, 1818, he tendered to the justice good and sufficient bail. The defendant objected to the evidence, because more than six months had elapsed between the time of offering the bail, and the commencement of this action. (See act 21st March, 1772, *Purd. Dig.* 352.) The court sustained the objection, and the plaintiffs' counsel excepted to their opinion.

Selden and *Farrelly* for the plaintiff in error.

Forward, contra.

The opinion of the court was delivered by

(Prather v. Connelly.)

GIBSON J. The plaintiff sued the defendant who was a justice of the peace, and had rendered a judgment against him from which the plaintiff had appealed, for not certifying the recognizance of bail along with the transcript; for want of which the appeal was quashed. At the trial, the plaintiff offered to prove, that on the 10th or 12th of July, 1818, (a period considerably more than six months preceding the commencement of the suit,) he had tendered sufficient bail; and the evidence thus offered, being objected to, was overruled. It is argued by the plaintiff in error, that the act limiting the time for bringing actions against justices, should, as it was not pleaded, have been laid out of the case. I can see no reason for that. The policy of requiring a statute of limitation to be plead in any case, is extremely questionable. There are, however, many cases where pleading is required by a long train of decisions, and these it would now be improper to disturb; but where the statute is beneficial, and there is no positive authority in the way, we should not be justifiable in interposing the slightest obstacle between the party and the enjoyment of the relief intended to be secured to him. Justices of the peace are bound to act, and at their peril: consequently from the infinite variety, and the minute nature of the business, which falls to the share of their jurisdiction, they are continually and even with the best intentions, in imminent danger of going wrong. The legislature has thought them, and justly I presume, fair objects of protection, and the laws made for that purpose, have always been beneficially construed. It would seem the correspondent statute of Geo. 2. which is the counterpart of our act, is constantly given in evidence on the general issue. (2 *Phillips Ev.* 245.) But still I am of opinion the evidence should not have been rejected. The injury complained of was the neglect to certify the recognizance of bail, by which the right of appeal was frustrated: and this may have happened immediately before the entry of the appeal with the prothonotary, and a considerable time after it was taken before the magistrate. The evidence rejected was that sufficient bail had been tendered: which was merely the ground work of the case and introductory of the evidence of the gravamen, the neglect to certify the recognizance; and that, from all that appears, may have been within the six months. The court could not say how far the plaintiff might have gone in making out his case, had he been suffered to proceed. Sometimes a plaintiff discloses all his evidence at once; and I will not say there may not be cases where the whole evidence, taking it all to be true, shall be so palpably deficient in making out a case on which the plaintiff might recover, as to justify the court in rejecting it on the ground of irrelevancy. Where, however, there is the slightest doubt, it is clear the evidence should go to the jury with the direction of the court as to its legal effect: much more so where the court in rejecting the evidence assume the existence of any collateral fact. In such case the consideration of the fact is withdrawn from the jury, which is error.

Judgment reversed and *venire facias de novo* awarded.

[PITTSBURG, SEPT. 27, 1822.]

PATTERSON *against* SWAN and another.

IN ERROR.

Where a defendant entered bail to entitle himself to a stay of execution under the provisions of the act of 21st March, 1806, and the plaintiff, after the expiration of the *cesset*, issued a *fieri facias* and levied on the defendant's real estate, and on the return of the writ issued a *scire facias* against the bail upon his recognizance, it was held, that the plaintiff was not bound to make his election between the defendant in the original action, and the bail, but might pursue his remedies against both or either, though he could receive but one satisfaction.

The doctrine of election holds only where the remedies are inconsistent with each other, not where they are concurrent.

Where a number are concurrently liable, they all remain so until satisfaction actually received from some of them.

THIS was a writ of error to the Common Pleas of *Allegheny* county.

M. M. and *I. Swan*, the defendants in error, and *Christian Latshaw* and *Richard T. Leech*, trading under the firm of *Latshaw & Leech*, by agreement in writing, filed on the 27th March, 1820, entered an amicable action in the Common Pleas of *Allegheny* county, as of *January* term, 1820, in which *M. M. & I. Swan* were plaintiffs, and *Latshaw & Leech* defendants. The same agreement contained a confession of judgment by *Latshaw & Leech* in favour of *M. M. & I. Swan*, for the sum of 802 dollars and 81 cents, with interest from the 24th day of *April*, 1820. On the 29th of *April*, 1820, *Robert Patterson*, the plaintiff in error, entered into a recognizance, written immediately under the docket entry of the amicable action and judgment referred to, in the following words: "*Robert Patterson*, of *Pittsburg*, bound in the sum of \$1,500, *sub cond.* for the final payment of the debt, interest, and costs, in this suit, in order to entitle the defendants to a stay of execution as freeholders, acknowledged *coram*

E. PENTLAND, *Proth'y.*"

A *fieri facias* was issued to *April* term, 1821, a levy made on certain real estate belonging to *Christian Latshaw*, an inquisition held, and an appraisement of the same.

On the 2d of *July*, 1821, *M. M. & I. Swan* issued a *scire facias* to *August* term, 1821, against *Robert Patterson*. The *præcipe* for the *sci. fa.* was in the following words:

" <i>M. M. & I. Swan</i>, v. <i>Robert Patterson</i>.	}	Issue <i>sci. fa.</i> on recognizance of special bail in No. 400, <i>January</i> term, 1820. R. BIDDLE, <i>Pltff's Att'y.</i> 2d <i>July</i>, 1821."
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The *scire facias* issued by the prothonotary in obedience to this *præcipe*, was in the following words:

(Patterson v. Swan and another.)

“*Allegheny County*, ss.

The Commonwealth of *Pennsylvania* to the Sheriff of the county of *Allegheny*, greeting: Whereas *M. M. & I. Swan*, lately in our court of Common Pleas, before our judges at *Pittsburg*, that is to say, on the 27th day of *March*, in the year of our Lord, 1820, by the judgment of the said court, recovered against *Latshaw* and *Leech*, the sum of 802 dollars and 81 cents, lawful money of the United States, for their damages which they sustained in a certain plea of trespass on the case, &c. as also the sum of — dollars and — cents, for their costs and charges by them about this in that behalf expended, whereof the said *Latshaw* & *Leech* are duly convict as appears to us of record: And although judgment in form aforesaid be given, execution thereof yet remains to be made. And whereas *Robert Patterson* lately, that is to say, on the 29th day of *April*, in the year of our Lord, 1820, in his own proper person came into our said Court of Common Pleas, before our said judges at *Pittsburg*, and became pledge and security for the said *Latshaw* and *Leech*, in the sum of 1500 dollars, lawful money of the United States as aforesaid, in that behalf should be made and levied of the goods and chattels, lands and tenements, of him the said *Robert Patterson*, to the use of the said *M. M.* and *I. Swan*, unless the said *Latshaw* and *Leech* should pay and discharge the same. Nevertheless the said *Latshaw* and *Leech*, the debt, damages, costs and charges aforesaid, to the said *M. M.* and *I. Swan*, have not yet paid, as by the said *M. M.* and *I. Swan*, we are in our said court informed: Whereupon the said *M. M.* and *I. Swan* have besought us that we would grant unto them a proper remedy in this behalf, and we being willing that right and justice should be done herein, do command you, that by good and lawful men of your bailiwick, you make known to the said *Robert Patterson*, that he be and appear before our said judges at *Pittsburg*, at our County Court of Common Pleas, there to be held for the county aforesaid, the first Monday of August next, there to show, if any thing he hath, or can say, why the said *M. M.* and *I. Swan* ought not to have *his* execution against him the said *Robert Patterson*, for *his* debt, damages, interest, costs, and charges, as aforesaid, according to the force, form, and effect, of the recognizance aforesaid, if to him it shall seem expedient, and further to do and receive whatsoever our said court shall then and there of and concerning them in this behalf consider: And have you then and there the names of those by whom you shall so make known to him, and this writ.

Witness the honourable *William Wilkins*, Esquire, president of our said court at *Pittsburg*, this fifth day of May, in the year of our Lord one thousand eight hundred and twenty-one.

(ATTEST.)

JAMES R. BUTLER, *Proth'y.*On the 28th *August*, 1821, the attorney of *M. M.* and *I. Swan*,

(Patterson v. Swan and another.)

entered a rule of reference, which was served on *Patterson's* attorney, and on the 15th of *September* following, the time stated in the rule, the plaintiffs' attorney appeared at the prothonotary's office, and the defendant not appearing, arbitrators were appointed, who on the 6th of *October*, 1821, made the following award:—"6th *October*, 1821. Arbitrators met and plaintiff's attorney appeared. Defendant did not appear. After hearing the evidence, we find for the plaintiffs, 872 dollars and 65 cents, and direct that defendant pay the costs of this suit, and of those accrued in No. 400, of *January Term*, 1820, (*M. M. & I. Swan, v. Latshaw & Lecch.*) The arbitrators were duly sworn.

(Signed)

ALEXANDER JOHNSON. *Seal.*NEVILL B. CRAIG. *Seal.*THOMAS ENOCH. *Seal."*

The attorney of *M. M. & I. Swan* had previous to entering a rule of reference, filed the following statement.

"<i>M. M. & I. Swan,</i> v. <i>Robert Patterson.</i>	}	No. 173, August Term, 1821. <i>Sci. fa.</i> sur. recognizance of bail, for final payment of money in No. 400, <i>January</i>, 1820.
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The plaintiff, by *Richard Biddle*, his attorney, states his cause of action as follows, *viz:* That the defendant on the 29th day of *April*, 1820, became bound in a certain recognizance in the sum of 1500 dollars, before the Court of Common Pleas of *Allegheny* county, conditioned for the final payment of a certain judgment obtained by the aforesaid plaintiff against *Christian Latshaw* and *Richard T. Leech*, trading under the firm of *Latshaw & Leech*, being No. 400, of *January* term, 1820, for the sum of 802 dollars and 81 cents debt, interest from 24th *April*, 1820, and costs of suit, in order to obtain for the said *Latshaw & Leech*, the stay of execution allowed to freeholders according to law, as by the said recognizance in the said court remaining fully appears; that the said stay of execution is fully ended, and the amount of the said judgment, interest, and costs is yet unpaid; whereby an action hath accrued to the said plaintiff, to demand and have of and from the said *Robert*, the sum of fifteen hundred dollars. Yet the said *Robert*, although often requested, hath not paid the same money, the debt, interest, and costs aforesaid, or any part thereof, but the same to pay hitherto hath wholly refused, and still doth refuse, to the damage of the said plaintiffs fifteen hundred dollars, and therefore they bring suit.

R. BIDDLE, *Pltff's Att'y.*

JOHN DOE, and RICHARD ROE,	}	Pledges, &c.
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On the 2d of *October*, 1821, *Patterson's* attorney entered the pleas of "*nul tiel record*," and "*payment*." A *fi. fa.* was issu-

(Patterson v. Swan and another.)

ed to *November* term, 1821, to which the sheriff made return, "superseded by writ of error."

The plaintiff in error assigned the following errors:

1. The *præcipe* directs a *scire facias sur* recognizance of *special* bail; the writ issued varies substantially from the *præcipe*, and does not set out any such recognizance as is directed.

2. The writ of *scire facies* does not set forth any description of recognizance known to the law, but is insensible and absurd in the material part of it.

3. The record referred to in the *præcipe* contains no such recognizance as is there directed; and the recognizance which the said record does contain, *viz.* a recognizance for the payment of the money, to obtain the stay of execution allowed to freeholders, is not set out in the *scire facias*; the material part of the condition being wholly omitted therein.

4. The statement filed by the plaintiff varies substantially from the *præcipe* and the writ of *scire facias*.

5. The second rule, *viz.* the rule of reference was not served on the party, nor in any other way according to law; nor had the said party either actual or constructive notice of the day, time, and place of meeting. The copy of the record on which the arbitrators acted is not a true copy, and the award itself does not state that the arbitrators were sworn before they tried the cause.

6. There was a *fi. fa.* with a levy on it undisposed of, pending against the defendant in the original action, at the time the *scire facias* was issued against the bail—the issuing of the *scire facias* was therefore illegal.

Hopkins, for the plaintiff in error. The *sci. fa.* does not state the condition of the recognizance, and therefore no judgment upon it can stand. He referred to the act of 21st *March*, 1806, *sect. 7. Purd. Dig.* 202.

Biddle, for the defendant in error. The condition of the recognizance was forfeited, and therefore the plaintiff had a right to proceed on it, although he had issued execution and levied on the property of the defendant, provided he had not obtained satisfaction. It is like the case of security on a writ of error.

GIBSON, J. delivered the opinion of the court.

Various errors have been assigned; no one of which is of sufficient importance to merit consideration, except the last. The defendant in the original suit entered bail to entitle him to a stay of execution, according to the act of the 21st *March*, 1806: and after the expiration of the *cesset*, the plaintiff took out a *fieri facias* and levied on the defendant's real property; on the return of which he issued this *scire facias* against the bail: and the question now is, whether he was bound to make his election between the defendant in the first action and his bail, or whether he might pursue both

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together? It is obvious that these stand in the relation of principal and surety. The form of the security is immaterial, as they are both liable for the same debt, although by different responsibilities; the judgment fixing the one, and the recognizance the other. The engagement of the bail is not conditional, to pay in case the principal does not—in which case he might perhaps not be liable, till all means to recover the debt from the latter were exhausted; but both are liable concurrently; and it is not pretended that recourse might not be had to the bail in the first instance. It is therefore difficult to see why recourse might not be had to both together. What injury can it do to the bail? Standing in the relation of a surety, if he could object in any case, it would be where the principal was *not* called on. Here, whatever is recovered on the judgment against the principal, will be for his benefit; for clearly the plaintiff can have but one satisfaction. It is well settled, that the doctrine of election holds only where the remedies are inconsistent with each other; and here they are not so. Nor is it pretended that the *levy* was satisfaction, as between the plaintiff and the defendant in the original judgment: and where a number are concurrently liable, they all remain so till satisfaction is actually received from some of them. It is perfectly clear, therefore, that the plaintiff might pursue the principal or his surety; or both at the same time.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 27, 1822.]

FETTERMAN for the use of FETTERMAN *against* PLUMMER'S Administrator.

Where a chose in action is equitably assigned, and suit is afterwards brought by the assignee, in the name of the assignor, for his use, the assignor, if he have no interest, is a competent witness for the plaintiff.

WRIT of error to *Venango* county, in an action brought by the plaintiff in error, on a single bill of *Samuel Plummer* to *John Fetterman*, dated *August 7th*, 1805, for 100 dollars, payable on demand. The plea was payment, with leave to give the special matters in evidence. The plaintiff, after having given the single bill in evidence, and an equitable assignment of it, dated *November 1st*, 1810, by *John* to *James Fetterman*, indorsed thereon, proved by the testimony of *Ralph Marlin*, Esq. attorney at law, that he had received the single bill from *James Fetterman*, to bring suit upon it against *Plummer*; that the bill was in his possession about a year, and that while it was in his possession, he had called upon an agent of *Plummer* to make an arrangement for the payment of the money. He then offered *John Fetterman* as a witness, who was objected to on the ground that he was *the plain-*

(Fetterman v. Plummer's Administrator.)

tiff in the cause. The court sustained the objection, and sealed a bill of exceptions.

Selden, for the plaintiff in error.

The witness offered and rejected was merely a nominal plaintiff, who before the action was brought, had parted with all his interest in the single bill on which it was founded, and who therefore had neither interest in it, nor control over it, and who was not answerable for the costs. There was consequently no objection to his being sworn, except that he was a party on the record, which forms no reason for his exclusion, *Man v. Ward*, 2 *Atk.* 229. *Steele v. Phoenix Ins. Co.* 3 *Binn.* 306. *McEwing v. Gibbs* 4 *Dall.* 137.

Forward, contra, did not deny that a nominal plaintiff might be a witness, provided the court were satisfied that he had no interest, but insisted that his being a party on the record was *prima facie* evidence of his being interested, and that it lay upon the *cestui que use* to show that he was not. It did not appear to this court that the witness was destitute of interest, for he might have agreed to be answerable to the assignee, in case he failed to recover against the defendant, or there might have been fraud, and in either case the witness was clearly interested.

Farrelly, in reply, said, that it was incumbent on the party who objected to the witness to shew interest. It did not appear to the court below, that he had any interest, or that there was any other objection than his being a party on the record; and this court will not, for the purpose of sustaining his exclusion, presume either fraud, or an agreement to be responsible to the assignee if he failed in this suit.

The opinion of the court was delivered by

DUNCAN, J. The only question is, can the nominal plaintiff who has assigned equitably an obligation under seal, be received as a witness to support the action. The person holding the beneficial interest in a chose in action not assignable, or one which is assignable, but where the assignment does not pursue the prescribed form, is regarded as the real party. This instrument was equitably assigned to *James Fetterman* before the bringing of the action. The suit was commenced and carried on by him and for his use. If the defence set up had been, that the obligee had received payment, or the consideration failed, or the obligation, for some cause, never recoverable by the obligee, he was not a competent witness, for he would be liable over either on an implied agreement, or on the ground of fraud, and was directly interested in the event of the cause. What testimony had been given by defendant, the bill of exceptions does not state, nor does it appear what *John Fetterman* was called to prove; he is rejected, not because he was interested, but solely from his character as plaintiff. This doctrine was very

(Fetterman v. Plummer's Administrator.)

fully considered in *Steele v. Phoenix Ins. Com.* 3 Binn. 306. The rule there laid down, was "that a plaintiff, who after the commencement of the action, has assigned his property to trustees, for the benefit of his creditors, and released all money that may be recovered in that suit, is a competent witness, *if all the costs are paid before the witness is sworn.*" The principles of this decision were adopted by *Washington*, Justice, in *Willing et al v. Consequa*, 1 *Peters*, 308; and the foundation of the rule, that a party to a suit cannot be a witness, is, the interest which he has in the event, both as to costs and the subject in dispute, and when that is removed, the objection must cease. In these equitable assignments, the name of the assignor must from necessity be used; the form of action requires that it should be used as plaintiff, nor could he refuse its use. From the very nature of the transaction, he agrees that it shall be so used; he is the nominal plaintiff, he has the legal title, but he is merely a trustee, and the name of *cestui que* trust inserted in the record is notice of the trust; he has no interest in, nor power over the action. A trustee having the legal estate, but having no real interest, is examined every day in a Court of Chancery, *Athly v. Tate*, 3 *Atk.* 604. There is a clear distinction, where the assignment is before, and where it is after action brought. The nominal plaintiff is not liable for costs where the transfer is *bona fide*, and before action brought, and takes no part in carrying on the suit, and is to gain nothing by its termination, *Nestor v. Walker*, 2 *Brown* 171. He is liable where he brings the action before assignment; he sues in his own name, and for his own use, and he cannot discharge himself from this liability, by a subsequent transfer of the right of action. But when the assignment is before action, it is very different; there from the first he is merely nominal, suffering that which he could not prevent, his name to be used as a trustee, by the *cestui que* trust. In *Drum's Lee v. Simpson*, 6 *Binn.* 485, the trustee was admitted as a witness, though there he was received to testify against the supposed *cestui que* trust. The chief justice in delivering the opinion of the court states, that the name of the trustee is used by the *cestui que* trust, who is liable for the costs of suit, and is in fact the only party interested, and that the practice of the English Chancery to admit a trustee as a witness has been uniformly adopted in the courts of law of Pennsylvania. There was no interest in *John Fetterman*, nor was he objected to on account of interest in the cause, but merely in his character of plaintiff, and as he would not be liable for costs in any event, no objection remained; it was as much removed as if the costs had been paid into court. The witness should have been admitted, and the judgment is therefore reversed, and a *venire facias de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

[PITTSBURG, SEPT. 27, 1822.]

PAUL and another *against* HARDEN.

IN ERROR.

Where there is a general verdict on several counts, the court cannot amend the judgment by entering it specially on one count and leaving the other count without a judgment, though they might amend the verdict, and then make the judgment correspond.

WRIT of error to *Fayette* county, in an action on the case, brought by the defendant in error against the plaintiffs in error. The declaration contained two counts, on which, at the trial, a general verdict was taken for the plaintiff below, and judgment entered thereon. On the removal of the record to this court, several errors were assigned, only one of which is now material, since this court, in delivering its opinion, noticed no other. It was as follows:

After the writ of error brought, bail in error given, and writ produced to the Court of Common Pleas, that court ordered an amendment of the judgment, by entering it specially on the first count of the declaration and gave no judgment on the second count.

After argument by *Ross*, for the plaintiffs in error, and by *Kennedy* and *Campbell* for the defendant in error, the judgment of the court was delivered by

DUNCAN, J. There are various errors assigned on this record: to the declaration, to the issue, to the appeal, and to the judgment. The court will confine their inquiry and decision to the fifth error assigned; the amendment of the judgment, by entering it specially on the first count, and not giving any judgment on the second count. Every count states a distinct cause of action, and where there are several counts in the declaration, and some of them so faulty that a verdict will not cure the defect, and evidence to support the good counts has been given, the court will direct the verdict to be entered on the good counts, and this is done at any time during the term, though after writ of error delivered. But in this case the verdict was a general one, and it is not amended by the court's directing the verdict to be taken on one count. The judgment is general, and afterwards amended by the court directing judgment to be entered on the first count. If the court had amended the verdict by directing it to be taken on the first count, and then entered a judgment, this court might have considered it in the same light as if a verdict had been found for the plaintiff on the first count, and for the defendant on the second. But the court permitted the general verdict to stand. They do not amend nor take any order on it, but enter a judgment on one count only, leaving the verdict on both counts on the record, and disposing of one only by judgment. On a general finding, not amended by entering the verdict on one count, the judgment must be general; for in no other way can the

(Paul and another v. Harden.)

defect of a general verdict, where there are bad or inconsistent counts, be cured, but by entering the verdict on the good counts. It is the verdict that is to be altered; the judgment cannot amend or change that. The record presents a general finding for the plaintiff on both counts, and a judgment only on one of them; thus leaving a portion of the cause on the record without a judgment either for plaintiff or defendant. This court are not friendly to nice and technical objections, where the cause has been tried on its merits; but no principle can be found to support this judgment, which is partial, where the judgment is general. This being a reversal for an error in the judgment, a *venire facias de novo* cannot be granted; and this has rendered it unnecessary to give any opinion on the other matters assigned as errors.

Judgment reversed.

[PITTSBURG, SEPTEMBER 28, 1822.]

McCLURG and another *against* BOWERS, Special Bail of
WHITING.

IN ERROR.

Special bail has until the *quarto die post* to surrender the principal.

If the principal be in court within the four days ready to be surrendered, and the court, on a rule to show cause why he should not be surrendered, hold the matter under advisement, without committing the principal, he may be surrendered when the court make the rule absolute, although the four days have expired.

QUERY—Whether an order for an *exoneretur* be the subject of a writ of error?

It appeared from the record of this case returned on a writ of error to Allegheny county, that it was a *scire facias* against special bail. On the fourth day after the return of the writ, the defendant having the principal in court, ready to be surrendered, obtained a rule on the plaintiffs, to show cause, why the surrender should not be made as of the first day of the term, and an *exoneretur* entered on the bail piece. The court held the case under advisement until the 21st of the following *January*, and then ordered that the rule should be made absolute, the defendant paying the costs of his rule, and also the costs of the *scire facias*. The principal was immediately surrendered and an *exoneretur* entered, upon which the plaintiffs sued out a writ of error.

Hopkins, for the plaintiffs in error.

Ross, for the defendant in error.

TILGHMAN, C. J. delivered the court's opinion.

This is a *scire facias* against special bail. On the 4th day after the return of the writ, the defendant having the principal in court, ready to be surrendered, obtained a rule on the plaintiffs to shew cause,

(M'Clurg and another v. Special Bail of Whiting.)

why the surrender should not be made, as of the first day of the term, and an *exoneretur* entered on the bail piece. The court held the case under advisement until the 21st January following, and then ordered that the rule should be made absolute, the defendant paying the costs of his rule, and also the costs of the *sci. fa.* On this the principal was immediately surrendered, and an *exoneretur* entered.

Two questions have been made: 1st, Whether the bail was entitled to four days for surrender, after the return day of the writ. 2d, Supposing he was, whether the surrender ought not to have been made on the fourth day, and not delayed till the 21st January, when the court made the rule absolute. As it is the desire of the bar to have the practice settled by the opinion of this court, we will give our opinion, although we do not consider the case as brought regularly before us, because it does not appear by the record, that the *sci. fa.* has been finally disposed of in the court below. There has been neither judgment nor discontinuance entered. And even if the *sci. fa.* had been ended, it would be a question, whether an order for an *exoneretur* be the subject for a writ of error.

We consider it as settled by long practice and understanding, that the bail has till the *quarto. die post*, to make the surrender. It was so decided by this court, before the revolution, and has been so held ever since. Prior to the revolution we had no printed reports; and, if no case on this point has been reported since, it probably is, because the law has been considered as too well settled to admit of dispute.

The principal was in court ready to be surrendered within the four days; and if the plaintiff had consented to accept the surrender and enter an *exoneretur*, he would have been immediately surrendered. But, as the court thought proper to hold the case under advisement, we do not think it right that the bail should suffer for it. The court might have ordered the surrender to be made, and committed the principal, while they kept the matter under consideration; but they did not, and it was understood, that until they decided, every thing respecting the surrender should remain in *statu quo*. Under these circumstances, we think the bail should be protected; and we should not reverse the order for the *exoneretur*, even if the case could be brought before us in such a shape as would authorise us to decide on it.

[PITTSBURG, SEPTEMBER, 1822.]

COOPER and another *against* SMITH.

IN ERROR.

In an action of ejectment to which the general issue is pleaded, it must appear, that the defendant dispossessed the plaintiff, or was in the actual possession of the land, or the plaintiff will be defeated.

The return of the sheriff under the act of assembly of *April* 13th, 1807, is only *prima facie* evidence of the possession of any defendant, whether his name be in the writ of ejectment, or be added by the sheriff; and such defendant may rebut it, by showing that he was not in possession.

The act of assembly of *March* 11th, 1784, authorising *John Sumral* to establish a ferry over the *Youghiogany* river, did not vest a right in him to land upon the landing of any persons without their consent.

A possession to prevent a recovery, or vest a right, under the statute of limitations, must be actual, continued, adverse, and exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant, exclusive, and adverse; but a continued, exclusive possession and enjoyment, with the knowledge and acquiescence of the owner of the inheritance, for twenty-one years, would be evidence from which a jury might presume a right, by grant or otherwise, to such easement.

Bela Smith, the defendant in error, brought an ejectment in the Common Pleas of *Westmoreland* county, against the plaintiffs in error, *Robert Cooper* and *John Robb*, to recover a piece of land, bounded on the *Youghiogany* river, and included within the limits of *Smith's* survey. The writ was served upon *Robb*, who pleaded not guilty, with leave to take a special defence; and *Cooper* was admitted as a defendant, and pleaded "not guilty, with leave to take a special defence," and took defence "for a ferry across the *Youhio-gany* river, where the great road from *Somerset* through *Mount Pleasant* and *Robbstown* to *Washington*, in *Pennsylvania*, crosses said river at or near the lands mentioned in the writ; and also, for a landing-place for the boats and craft used at said ferry, on the south side of the river, being 50 feet in length on the beach of said river, and extending 10 feet from said river along said great road." Upon the trial, at a special court held by President *Roberts*, *Smith* gave in evidence a location, No. 2305, for 300 acres of land, by *Francis Allison*, Jun. dated *April* 3d, 1769, for whom a survey was made, including 194½ acres of land, on the 22d *May*, 1770, upon which survey a patent issued to *Allison* on the 24th of *February*, 1783. He also gave in evidence the will of *Allison*, dated 9th *May*, 1813, and articles of agreement between the executors of *Allison* and himself, dated 26th *September*, 1815. He then produced *Joseph Vankirk*, a witness, who testified, that he had been called upon by *Isaac Robb*, in 1804, to survey the land, that *Robb* showed him a poplar stump for a corner, and he found the lines, which were too long, the line N. 10 degrees E. 96 perches, measuring 109½ perches, that there was a fence in the division lines between *Sumral* and *Allison*. Witness knew the land since 1800, and for 10 years before. *H. Bartlett* lived in *Allison's* place

[Cooper and another v. Smith.]

about 30 years ago, and *S. Reed* lived on it in 1800. Witness ferried from both sides for about two years at that time. One *McBeath* then came there, and was the tenant of *Sumral* as well as of *Allison*, who used the ferry for a year and an half or two years. In 1804 witness rented the place from judge *Young*, who was *Allison's* agent, and the tenant of witness ferried some during that time. It was not then considered of any great consequence, and *McBeath* got tired of it and gave it up. In 1805 witness leased to one *Green* who lived there a year, and witness kept the ferry and used it on both sides. *Isaac Robb* lived on *Sumral's* land in 1806, and witness kept the ferry in 1805, 1806, 1807. *W. C. Luken* rented of Judge *Young*, and left the place about 1814 or 1815, he ferried a good deal, and there was much contention about it; *Sumral* always claimed the Fort field, and showed witness a copy of *Allison's* patent, and seemed satisfied the claim went to the river. The *Sumral's* used the ferry when *Bartlett* lived there. The great road from *Robbstown* to *Williamsport* and *Washington* crosses this ferry, and it was travelled as a public road, when witness first knew it, and it has not been since materially altered at the landing. The *Sumral's* were away in 1798, and then one *Shank* ferried, and one *Purly* in 1799; they lived in the ferry-house at *Robbstown*. *McBeath* lived in *Sumral's* house in 1798, and rented *Sumral's* property from *Sumral*, and *Allison's* from Judge *Young*. *Robb* was constantly bringing suits against *Luken* for ferrying, and always succeeded. *McBeath* occupied the ferry in 1802 and 1803, and in 1805, 1805, 1806, and 1807, witness occupied both sides, and lived on the *Robbstown* side, and *McBeath* on *Sumral's* land.

Andrew Robertson, a witness produced by *Smith*, testified, that in 1775, *Sumral* was said to be a tenant under one *Miller*. That *Bartlett*, who claimed under *Allison*, lived on *Allison's* land in 1791 or 1792, being the first man who had a house there, he stayed till 1794, when he died. *Sumral* rented the land from *Allison* in 1798, and occupied the ferry when *Bartlett* lived there. In 1775 *Sumral* lived on the land adjoining to *Allison*, and then kept a canoe to take people across, and it was then called *Sumral's* ferry; he remained there and kept the ferry until he died, sometime about 1794, and his heirs remained there and kept the ferry for some years after. *McBeath* then lived there and kept the ferry. One *Isaac Morgan* occupied both sides of the ferry, and after him *John Robb* lived in *Sumral's* house and occupied the ferry. It had generally been known by the name of *Sumral's* ferry ever since witness knew the country. *John Robb* settled there 5 or 6 years ago, and no one ferried on that side since he went there, except himself or those who held under him. One *Shroeder* rented from *Allison* about 4 or 5 years ago, and *Luken* ferried under him. *Robb* and *Luken* disputed about the ferry, and *Robb* has held it ever since *Smith* bought. *John Orr* testified, that *Bartlett* first settled on *Allison's* land, which *Sumral* had occupied before, but *Bartlett*

(Cooper and another v. Smith.)

never occupied the ferry. *John Robb* and *Luken* had a dispute about it, they both lived there at the same time, and witness had crossed in both their boats, but did not know whether *Robb* claimed it himself; he lived in *Sumral's* house. One *Vankirk* once occupied the ferry and lived on the *Robbstown* side chief part of the time. Witness first knew *Sumral* in 1786, he then lived on the land adjoining *Allison's* and occupied the ferry, which was always called *Sumral's* ferry.

William Campbell testified, that *Sumral* claimed the ferry, and that he had known it by the name of *Sumral's* ferry more than thirty years ago, that *Sumral* then lived on the land adjoining Dr. *Allison's*, and occupied the ferry.

James Murray testified to *Robb's* claim, and that when he made a survey for *Robb*, it was objected to by *Cooper*, who said he was agent for *Sumral*, and that *Robb* had no title.

The plaintiff then gave in evidence the record of an action of ejectment, brought in the year 1798, by *Benjamin Davis*, to recover 500 acres of land. *Davis's* claim embraced *Sumral's* land, and great portion of Dr. *Allison's*, then occupied by his tenant, the widow of *Bartlett*. Dr. *Allison* was made a co-defendant to this action, in which the defendants had a verdict. He also gave in evidence three letters from *John Sumral* to Dr. *Allison*, dated October 4th, 1786, April 8th, 1789, and June 18th, 1791, in the first of which he referred to the old location, and in that of 1798, said, he had a separate patent for the ferry.

On the part of the defendant, the act of assembly of 11th March, 1784, (2 Dal. Laws, 175,) was relied upon, and *John Bedsworth* testified, that he knew *Sumral's* ferry since *Sumral* first used it, that he kept it, and it was his, while he lived. When witness came there in 1769, there was no ferry. *Sumral* came there after that time. Witness could not say who had possession after *Sumral's* death, but he knew of *Luken* being there.

President *Roberts* charged the jury in substance as follows: "This is an ejectment for a piece of land bounded on the *Youhio-gany* river, and embraced within the plaintiff's survey. That the plaintiff has exhibited a clear legal title by location, survey, and patent, is not controverted, but admitted. This case, as has been stated on the part of the defendant, lies within a narrow compass; and the candour with which the defence has been conducted, so narrows the ground, that it results in a question of law, upon which it is the duty of the court to give an opinion. There is no doubt but that the land embraced within the plaintiff's survey belongs entirely to him, and that such survey extends to the river, cannot be controverted. The defendant claims no part of it, but he claims an easement in it, *i. e.* a right to land boats upon it, and to pass through a part of it. He founds his claim to this easement upon the statute of limitations—in other words, he says, he

(Cooper and another v. Smith.)

has had such a long uninterrupted possession as that statute will protect. Now where is the evidence to establish such a claim? Does the evidence show any claim set up, or even pretended, by *Sumral* to a right of way over the lands of Dr. *Allison*? Does he claim the land itself, or an easement on the lands of another? I refer you to his letter of the 4th of *October*, 1786, in which he notices the old location; to his letter of 1789, where he mentions his having a separate patent for the ferry; and to the letter of 18th *June*, 1791: In 1798 a suit was brought by *Benjamin Davis* for five hundred acres of land, embracing *Sumral's* land, and a great part of Dr. *Allison's*, then occupied by his tenant, the widow of *Bartlett*. Dr. *Allison* was made a co-defendant, and the verdict was for the defendants. The statute of limitations was intended for the repose of society, in order that where there has been a long uninterrupted possession, it should not be disturbed. But to protect a possession under this act, it must be an actual, not a constructive possession—and so of an easement—the actual and uninterrupted use of it, as in the cases quoted of ancient lights, upon which subject questions frequently arise in ancient and crowded cities, where the confined space which persons may have for building, renders it desirable for persons to have windows opening into their neighbour's lots. This privilege is sometimes purchased; sometimes, perhaps, gratuitously granted. However this may be, if persons owning the grounds adjoining such buildings, suffer the windows open into their ground, to remain open for 21 years, a reasonable presumption is afforded, that a privilege has been granted; and after such a lapse of time, and constant acquiescence, the law will not suffer the enjoyment of it to be disturbed. Now what kind of possession had *Sumral*? As to the ferrying across the river, he had a right to do it, and the act of assembly of *March* 11th, 1784, sanctioned that right; but I cannot conceive that the act of assembly has any bearing. It is said that the legislature have a right to regulate ferries—be it so—they have also a right to regulate pedlars, public inns, &c., but no legislative act authorises one man to establish a ferry on another man's land, to land boats upon it, and pass through it, any more than they could grant to a pedlar a right of way through the lands of another man, or authorise the establishing of a public house on the land of another, against his consent. *Sumral* might lawfully ferry and land his boats in the public road, but if he landed upon the land of another, without his consent, he was a trespasser."

Upon this charge, to which the defendant tendered a bill of exceptions, which was sealed by the court, the jury found for the plaintiff.

The plaintiffs in error assigned the following errors.

1. That a writ of ejectment will not lie for an easement, or mere incorporeal hereditament.

(Cooper and another v. Smith.)

2. The court ought to have directed the jury, that the statute of limitations would protect the defendants.

3. The court ought to have directed the jury, that they might, and ought to presume a grant of a right to land boats on the margin of the river.

4. The court ought to have directed the jury, that the length of possession was in law sufficient from which to presume a grant.

Alexander, for the plaintiff in error. A writ of ejectment will not lie for an easement, nor for any incorporeal thing, *Lefevre v. Lefevre*, 4 *Serg. & Rawle*, 243. *Black's Lessee v. Hepburn*, 2 *Yeates*, 331. The defendants pleaded, "not guilty, with leave to give in evidence the claim of an easement;" the trial was therefore upon that issue, and the judgment was, to recover the easement. The second, third, and fourth errors assigned may be reduced to one, viz. that after the length of time we have enjoyed this easement, a grant should be presumed, *Mayor of Kingston v. Hull*, *Eldridge v. Knott*, 1 *Cowp.* 102, 214. *Prevost v. Gratz*, 6 *Wheat.* 504. *Phil. Evid.* 119, 120, 121, 122. The act of assembly of 13th March, 1782. (2 *Dall. Laws*, 57,) establishing ferries over the *Youghiogany* and *Monongahela* rivers, and the act of 11th March, 1784, authorising *John Sumral* to establish a ferry over the *Youghiogany* river, (2 *Dall. Laws*, 175) declared those rivers to be public highways. It is matter of law what circumstances will justify the presumption of a deed. *Stoever v. Whitman*, 6 *Binn.* 416.

Foster, for defendant in error. No questions were proposed to the court upon which to charge the jury. This ejectment was brought for a tract of land; the defendant, *Robb*, pleaded "not guilty," and afterwards *Cooper* was admitted a defendant, and took defence for a ferry across *Youghiogany* river, for which part defendants say they are not guilty. The act of assembly makes the sheriff's return *prima facie* evidence of possession. It is not pretended that an ejectment lies for an easement; this ejectment was for land; and the sheriff's return is evidence of possession by the defendants, one of whom, *Robb*, claimed part of this land, for he had a survey on it, and he was the tenant of *Cooper*, the agent of *Sumral*. *Cooper* was admitted to defend as landlord, and by the provisions of the second section of the act of April, 13th, 1807 (4 *Sm. Laws*, 476,) admitted himself to be in possession. It is well settled that an ejectment will lie for a highway, and the sheriff may deliver possession subject to the right of way. *Run. Eject.* 130. The defendants objection to the charge of the court is, that the jury were not directed to presume a grant from Dr. *Allison*. It is impossible to know what the facts were, and the court could only have said, that if they believed certain facts, they ought to presume a grant. In 1789 *Sumral* rented of Dr. *Allison*, and held till 1791, previous to which time the ferry had been only with a canoe. In 1791,

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Bartlett became *Allison's* tenant, and he, or his widow, remained on the land till 1799. The court was not requested to charge on any point, and it is to be presumed that the judge stated the *facts* correctly; taking the evidence as we have it, the court charged on the *law* correctly.

Alexander in reply. The contest between the parties was exclusively concerning the easement claimed by the defendants. We know nothing of any survey made by *Robb*, and the record does not show it. The ejectment was against *Robb*; the sheriff returned "served," and *Cooper* came in as landlord and pleaded *not guilty as to a certain part*, in which he claimed an easement. *Not guilty* does not confess possession. There was not title to land in issue, nor was there a judgment for land. The plaintiff ought not to have gone to trial upon such an issue, and there has been a *mistrial*. The judge said, the cause was narrowed to a question of law, on which it was his duty to charge the jury, and, although not requested, if he charged wrong, it is error. The question is then, whether from the evidence a grant to *Robb* ought not to be presumed. *Robb's* claim commenced in 1770, and continued till 1808 or 1809, and *Sumral* in 1808 or 1809, wrote to *Allison* that he claimed the ferry under the act of assembly. In 1803 or 1804, Judge *Young*, as agent for *Allison*, leased the land, but did not interfere with the ferry, which he never leased.

The opinion of the court was delivered by

DUNCAN, J. The action of ejectment is one of possession; and it is no bar to a recovery that another possesses a right of way, or other easement, for the owner of the soil may maintain an ejectment for land over which a highway is laid out; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner, and he may use it in any way not inconsistent with the public right or easement. *Chester v. Alker*, 1 Burr. 138. 145. *Curtelyou v. Vanbrunt*, 2 Johns. 357. *Jackson v. Hathaway*, 15 Johns. 447. The plaintiff below sued to recover the possession of a certain described tract of land, the right to which is admitted to be in him. If the defendant did not dispossess the plaintiff; if he was not in the actual possession; on the general issue, the only plea in ejectment, "not guilty," he might have defeated the plaintiff; for the allegation in his writ is, "that the defendant has in his actual possession," &c. The return of the sheriff, by the act of 13th April, 1807, is made evidence of such defendants as are marked served by the sheriff, being in actual possession of the whole or part of the premises, and this whether their names are in the writ, or added by the sheriff on finding them in possession; but this is only *prima facie* evidence, and the defendant may rebut it by showing, that he was not in possession. This was a very necessary amendment of the law; for under the ancient form of ejectment, the

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plaintiff, though defendant confessed lease entry and ouster, was frequently taken by surprise by a defendant calling on him to prove his possession. On the trial, the defendant, *Robb*, appeared, and pleaded not guilty, with leave to take a special defence. When *Cooper*, the landlord, was admitted to become a defendant, he very specially defends as for a ferry on the *Youghiogany* river, where the great road from *Somerset* intersects the *Mount Pleasant* and *Robbstown* road, to *Washington, Pennsylvania*, and crosses said river, at or near the land mentioned in the writ; and also, for a landing place for the boats and craft of the said ferry, on the south side of the said river, being fifty feet in length up and down the said river, and extending ten feet from said river along said great road. This right of way and of landing on the ground of another, is claimed, first under the act of 11th *March, 1784*, giving *John Sumral* a right to ferry across *Youghiogany* river. The act contains this clause, “ *Provided always*, that nothing contained in this act shall be construed to vest a right in the said *John Sumral*, his heirs or assigns, to land any boat or boats upon a landing belonging to any other person or persons, without their consent first had and obtained;” and all the acts of assembly vesting ferries in particular persons, show the uniform opinion of the legislature to have been, that to enable a person to keep such ferry, he must either hold the ground where the landing is made, or obtain the consent of the owner of the land for that purpose. In *Chambers v. Furey*, 1 *Yeates*, 167. when the right to land and receive freight on the lands of another, on the banks of a navigable stream without his consent, was first agitated, this very act authorising *Sumral* to keep a ferry, was relied on as evidence of legislative construction, that there is no right, custom, or prescription, in *Pennsylvania*, by which one man can land or receive freight, on another’s freehold, on the banks of a navigable river, without his consent, even though it be on a public highway. *Sumral’s* appears to be the first legislative act granting a right to a ferry. An act passed the same day, vesting a ferry over the *Monongahela* river, in *John Ormsby*, with a special proviso as to landing boats on lands belonging to others without their consent first obtained, and every law passed since contains a similar clause. It would be a violation of the constitution to deprive the owner of the soil of this right, and the legislature have always carefully guarded against such construction by the most explicit declarations. The right to the bed of a navigable river is presumed to belong to the commonwealth, but the right to the adjoining lands vests in the owner of the soil; hence arises the right to wharves in the city of *Philadelphia*, and other commercial ports—no one can use them without making compensation to the owner. The place where the landing was, if a public highway, in an action of trespass would not be a justification. The position of the court, that *Sumral* might lawfully ferry and land his boats on the public road, was erroneous, for this was the very question in

(Cooper and another v. Smith.)

Chambers v. Furey; and C. J. M'KEAN and Justice YEATES decided, that the dedication of ground for the purposes of a public road, gave no right to others to use it without the consent of the owners, for the purposes of landing or receiving freight. There are few ferries whose landing place is not a public highway; ferries would become a property in common, subject to continual strife, and where the strongest must ever prevail. The common law to prevent this confusion, assigns the exclusive right of all property capable of being so enjoyed, to some determinate owner. It has assigned to the owner of the soil, the right of landing on his own soil, on the banks of all navigable rivers. The late proprietors of *Pennsylvania* claimed a right by prerogative to grant patents for ferries; but they never did grant a patent where the party was not possessed of lands on both sides of the water, or at least had not the permission of the owner of the landing. The defendant sets up as a bar the act of limitations—21 years' possession. The possession to prevent a recovery, or vest a right in the possessor, must be actual, continued, exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant, exclusive and adverse. Indeed the counsel for the plaintiff seemed to abandon this as untenable, and to rely on the 3d and 4th errors assigned, which are in fact the same, and form but one point. Ought the court to have directed the jury from the enjoyment of this way and landing, proved by defendant, to have presumed a grant of any easement? And if the plaintiff in error had given any evidence to show a continued exclusive possession and enjoyment, with the acquiescence of the owner of the inheritance, for 21 years, by way of analogy as to the time of the statute of limitations, the court should have left this to the jury as presumptive evidence of a right, by grant or otherwise; and unless contradicted or explained, the jury ought to believe it. Length of time cannot be said to be an absolute bar like a statute of limitations, but is only a presumptive bar to be left to a jury. This presumption of grant from long usage, is for the sake of peace and furtherance of justice. It cannot be supposed, where there has been a long exercise and possession of such right, that any person would suffer his neighbour to obstruct the lights of his windows, or render his house uncomfortable, or to use a way for so long a time with carts and carriages, unless there had been some agreement between the parties to that effect: but this principle must always be taken with this qualification, that the possession from which a party would presume a grant or easement, must be with the knowledge of the person seized of the inheritance, 2 *Saund.* 175. The evidence in this case is very far from proving any such possession. It does not possess one ingredient of it. It was not a continued, successive, uninterrupted enjoyment by *Sumral* and those claiming under him. He was the agent of *Allison* the owner for some time; his tenant for some time; other tenants of *Allison's* occasionally used

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the ferry, and there was at other times contention respecting it. Besides, *Robb* set up a claim directly adverse, had a survey made cutting off a small strip, under the idle pretence that *Allison's* survey did not come down to the water. That confining him to his distances on his survey, and to his marked lines, there would be a vacant spot by the water side. The surveyor marks the trees on the bank, but includes all to the water, and so represents and returns it. The river here is the boundary of *Allison's* survey. The patent describes this as his boundary; the right of *Allison* is acknowledged by all, and it is admitted by the special defence. Nor is there a spark of evidence to be left to a jury to presume a grant, either to *Sumral* or any claiming under him; but it excludes all presumption of agreement, or grant from *Allison* the owner: he never witnessed these intrusions, he never saw the land, he never acquiesced in these usurpations. Every act of *Sumral's* was a trespass; it was contrary to the provisions of the act, vesting in him the right of ferry. The repetition of the trespass did not give a possession protected by the act of limitation. It might as well be contended, that a man entering into the woods of another, and cutting and carrying away his timber, and continuing the practices for 21 years or more, thereby acquired a right to the land by these vagrant acts of repeated trespass. The court are therefore clearly of opinion, that the plaintiff has failed in supporting any of the errors assigned. It might have been sufficient to have decided this case on one ground, that if the plaintiff in error had a right of easement, the only right which he claims, still the plaintiff below had the right to the soil and the possession; but they have considered it proper to give an opinion on all the errors assigned.

Judgment affirmed.

END OF SEPTEMBER TERM, PITTSBURG, 1822.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SOUTHERN DISTRICT—OCTOBER TERM, 1822.

[CHAMBERSBURG, OCT. 21, 1822.]

Case of the road leading from the house of MATTHEW MILLER.

CERTIORARI.

The description of a road prayed for by petition as beginning at a dwelling house, which is known, and ending at a public road, is sufficiently certain.

A road from the plantation or dwelling house of a petitioner, to or from the public highway, or any place of public resort, as described in the 17th section of the act of 6th April, 1802, is a private road, to be laid out, &c. in the manner therein prescribed, and there is no authority in any court of Quarter Sessions, to have it laid out as a public road.

CERTIORARI to the Court of Quarter Sessions of the county of *Cumberland*, by which was brought up the order of that court, confirming the proceedings to lay out a road, leading from the house of *Matthew Miller*, to the public road leading from *Carlisle* to *Harrisburg*, commonly called the "*Trindle Spring Road*," in the county of *Cumberland*.

A petition was presented to the court below, at *January* sessions, 1820, by four persons, inhabitants of *Middleton* and *Carlisle* townships, in said county, praying the court to appoint proper persons to view, and lay out, a *private* road, "to lead from the dwelling house of *Matthew Miller*, now in the occupancy of *Isaac Vanorsdale*, in *South Middleton* township, to the public road leading from *Carlisle* to *Harrisburg*, commonly called the *Trindle Spring Road*." The court appointed six viewers, five of whom, (the other not attending,) reported, that they adjudged the same necessary for a *public* road, as represented by a draught annexed, and agreeably to certain courses and distances mentioned in

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the report. Exceptions were filed to this report in *November*, 1820, and at *January* sessions, 1821, on the petition of certain of the inhabitants of *South Middleton* township, for a review, the court appointed six reviewers, who reported that there was no occasion for the road. This report was set aside by the court, in *August* following, and six re-reviewers were appointed, who reported, that the road was necessary for a public road, and returned its courses and distances, and a draught. This report the court, after argument, confirmed, and ordered the road to be opened. With the above proceedings was returned an affidavit by *Matthew Miller*, the owner of the house above mentioned, (filed in the court below,) that he had no notice of the time when the re-review was to be had, nor did he know of it till he accidentally saw the re-reviewers on the ground, when they had nearly completed their business. *Miller* was not one of the subscribers to the petition for the road.

The following exceptions were taken, on behalf of *Matthew Miller*, and several inhabitants of the township in which the road was situated.

1. That the petition is for a private road, and the petitioners have no interest, nor do they represent any person having interest in the dwelling house from which the road is prayed for.

2. There is no point specified in the petition, at which the road prayed for should intersect the public road and terminate.

3. No notice was given of the review to the owner of the dwelling house, from which the road proceeds.

4. No public road could be laid out between the points prayed for, and stated in the petition.

Metzgar and *Carothers* against the road.

Mahon and *Williamson*, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. Certain persons petitioned the Court of Quarter Sessions of *Cumberland* county, for a *private* road, leading from the dwelling house of *Matthew Miller*, (then occupied by *Isaac Vanorsdale*,) to the public road leading from *Carlisle* to *Harrisburg*, commonly called the "*Trindle Spring Road*." After several views and reviews, a *public* road was laid out and confirmed by the court. The proceedings have been brought before us by *certiorari*; and are now opposed by *Matthew Miller*, the proprietor of the dwelling house, and adjoining land mentioned in the petition, (who was not one of the petitioners,) and also by sundry inhabitants of the township in which the road is situated. The following objections were made to the proceedings:—1. That the petitioners had no interest in the dwelling house from which the road was to run. 2. That there was no point, specified in the petition, at which the private road was to intersect the *Trindle Spring Road*. 3. That on a petition for a *private* road, it was not lawful to lay out a *public* road.

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The second objection was very properly relinquished, because it was decided by this court, in the case of *Kyle's road*, 4 *Yeates*, 514, that the description of the road prayed for is sufficiently certain, beginning at a dwelling house which is known, and ending at a public road. The point at which the public road was to be intersected, was left to the judgment of the viewers, who would lay out the private road and report it to the court. As to the 1st objection, "that the petitioners had no interest," it would not be easy for this court to decide how the fact is, and it is not very material as the cause may be decided on the 3d objection. Private roads are to be paid for by the petitioners, and opened and kept in repair at their expence. It is therefore a circumstance which strikes us at first blush as very extraordinary, that when a private road is prayed for, the petitioners should not be indulged in their request to pay for it, and keep it in repair, but all this charge should be thrown on the public. In the case before the court, I have heard no good reason assigned for a public road. All that was wanted was a passage from the house of *Matthew Miller*, to the public road, a distance of a few perches. And when it is considered, that *Miller* himself objects to a public road, as extremely inconvenient, in consequence of the right which it gives to every man to pass over his property, up to the very door of his dwelling house, it is difficult to conjecture on what principle a public road was granted. The right of the Courts of Quarter Sessions to lay out roads, depends upon statute; for at common law they have no such authority. We have an act on that subject, passed the 6th *April*, 1802, *Purd. Dig.* 586. on which this case depends. By the 1st section, the court is authorised, on a petition for a *public* or *private* road, to appoint a certain number of persons who are to view the ground, and if they are of opinion that a road is necessary, they are to lay it out, and make report of their proceedings to the court, with a plot of the road; and they are to give their opinion, whether a public or private road is necessary. If the court approves of the report, the road is to be established and recorded. From the general expressions of this section, it would appear, that in case of all petitions, whether for public or private roads, the viewers are to judge, whether the road should be public or private. But in the 17th section, the case of private roads is particularly mentioned, and in order to form an opinion of the meaning of the law, the 1st and 17th sections are to be compared. The 17th section enacts, that on the petition of any person or persons, for a road, *from the plantation or dwelling house of such person or persons, to or from the public highway, or to any place of necessary public resort*, the court is to direct a view, and report, in the manner prescribed in the 1st section, *and if such road be found necessary*, the court shall direct of what width it shall be, so as the same shall not exceed 25 feet, and such road shall be recorded. It is to be opened and kept in repair, at the expence of the petitioners and of those who make

(Case of the road leading from the house of Matthew Miller.)

use of it, and if it is carried through any man's ground, the damage thereby occasioned is to be valued, and paid by the petitioners and those who make use of it, in passing to and from their dwellings. According to the 17th section then, when a road is petitioned for, from a man's dwelling house to a public road, all that the viewers ought to consider, is, whether it be necessary, and if it be, it is to be paid for, opened, and kept in repair, at the expense of the petitioners, &c. Taking the 1st and 17th sections together, we may conclude, 1st, that whenever a public road is petitioned for, the viewers are to give their opinion whether it should be public or private. 2d, When a road is petitioned for, from a man's dwelling house to a public road, this is in nature of a private road, and the viewers are not to express any opinion on that subject. There may be cases in which a few persons may wish for a road from one public road to another, or from one place to another, in which the public has not much concern, and in such cases, it is very proper that the viewers should give their opinion whether the road should be public or private. But when a passage is asked, from the land of an individual to a public road, it is scarce possible that the public should have any interest in it, and it would therefore be unjust, that it should be paid for, opened, or kept in repair at the public expense. This subject was brought before the court, in the case of *Kyle's road*, reported in 4 *Yeates*, 515. The point now under consideration was not expressly decided. But Judge SMITH expressed his opinion, that the viewers, on a petition like the present, had no right to return a public road, and a majority of the court appeared to incline to the same sentiment. It is a matter in which the public has a considerable interest. For the people may be burthened to an unknown extent, if they can be made chargeable with roads laid out solely for the accommodation of private persons. Upon an attentive consideration of the whole act of assembly, I am of opinion, that a road from the plantation or dwelling house of the petitioner, to, or from, the public highway, or to any place of public resort, as described in the 17th section, is a *private* road, to be laid out, paid for, and kept in repair at the expense of the petitioners, &c. in the manner prescribed in that section, and that there is no authority in any court of Quarter Sessions, to have it laid out as a *public* road. The proceedings in the case now before us, are therefore to be quashed.

Proceedings quashed.

[CHAMBERSBURG, OCT. 21, 1822.]

WILSON *against* STONER.

IN ERROR.

A survey is not evidence without showing an authority to make it, or proving that such authority existed and was afterwards lost.

Possession upwards of 30 years, under a survey found in the hand writing of an assistant deputy surveyor, indorsed "copied for return," with a memorandum by him, that there was an authority to make it, the lines of which survey are marked on the ground, is not a sufficient foundation to presume a warrant or authority.

ERROR to the Court of Common Pleas of *Franklin* county, in an ejectment brought by *William Wilson* against *Isaac Stoner*, in which a verdict and judgment were rendered in favour of the defendant.

The plaintiff claimed under a warrant in his own name, dated the 22d *July*, 1817, and survey thereon on the 4th *September*, 1817, for 58 acres and 64 perches of land in *Franklin* county, returned and accepted on the 1st *December*, 1817.

The defendant claimed under a survey of 55 acres in the name of *Isaac Baird*, made by *Samuel Lyon*, formerly assistant deputy surveyor for the district, and dated the 5th *January*, 1770. It was in the hand writing of Mr. *Lyon*, and was found in the deputy surveyor's office. It was indorsed in Mr. *Lyon's* hand writing, "copied for return;" and by a memorandum subjoined to it, also in Mr. *Lyon's* hand writing, it purported to have been made under an order for 300 acres; but in what name, or at what time, did not appear. No location or order was produced. It was admitted, that due search had been made for the order mentioned in this memorandum; but it could not be found. The survey was proved to have been made on the ground, and distinctly marked. *Isaac Baird* conveyed on the 3d *November*, 1773, to *Gabriel Carpenter*, by a deed, which recited the survey in favour of *Baird*; and on the 23d *May*, 1807, *Carpenter* conveyed to the defendant, *Stoner*. The defendant proved, that upwards of 30 years before the trial, and since,^(a) (though the time of the first act was not distinctly stated,) *Carpenter*, who lived on an adjoining tract, and after him the defendant, had cut timber on the premises, for building, and for rails. A building was erected in the year 1790, after which the land was in the possession of *Carpenter*, and subsequently of the defendant. The defendant relied on the above facts, and the alleged possession of upwards of 30 years, to support the presumption of the existence of an order or location, on which *Isaac Baird's* survey was made.

The plaintiff objected to the reading of the survey and deeds in evidence; but the court admitted them, and sealed a bill of exceptions.

(a) The date of the trial of the present suit, did not appear by the papers in the hands of the reporters.

(Wilson v. Stoner.)

The plaintiff requested the court to charge the jury, that there being no evidence of any warrant, location, order of survey, or office right, the survey was entitled to no weight with the jury.

But the court charged, that there was nothing in the law to prevent the jury from presuming the existence of an authority to make the survey, though it could not be produced. To support an ancient possession of long standing, a patent, a deed, and even an act of parliament, have been presumed. They further charged the jury, that if they were satisfied, that a regular authority existed under which *Baird's* survey was made, that such survey was regularly made upon the ground, and that the surveying fees were paid, which fact, from circumstances, backed by a long possession under the survey, might also be presumed, then the plaintiff ought not to recover.

Crawford, for the plaintiff in error. The court below were wrong in allowing the survey to be read in evidence, without any order or authority being first produced, to justify its being made. No case is to be found in which the courts have gone so far as this; in all of them there has been some evidence of an authority. In *Sproul v. Plumsted's lessee*, 4 Binn. 189, sundry warrants having been given in evidence, a survey was admitted, though it did not express by virtue of what warrant it was made: it was left to the jury to judge, whether it was made by virtue of any warrant. It is, in that case, distinctly admitted by the court, that if no sort of warrant had been shown, the survey ought to have been rejected. *Lessee of Brown v. Long*, 1 Yeates, 162, is an authority to the same effect. So a survey adopted by the land office is evidence, though not made by the regular officer. *Shields's lessee v. Buchanan*, 2 Yeates, 219. But, till some foundation for the act is shown, it is like a deed made by a person who has no title, which is not evidence. *Shields's lessee v. Buchanan*, 1 Binn. 188. *Peters's lessee v. Condron*, 2 Serg. & Rawle, 80. The memorandum of *Samuel Lyon*, that there existed an authority of some kind, had it been ever so precise and definite, was no evidence of its existence. In *Bonnet's lessee v. Devebaugh*, 3 Binn. 175, the declarations of Gen. *Armstrong*, that he had made a survey in 1755, under an order from the proprietaries, were rejected, though he was dead, and all his official papers had been accidentally burnt, and the warrant of acceptance recited, that the survey had been made under such an order. YEATES, J. says, a warrant or order of survey, some written direction, or instructions, from the commissioners of property, or some one of them, became necessary to justify the surveyor general, or his deputies, in locating land applied for. If the original, or a copy, cannot be produced, parol testimony of its loss, and contents, is admissible. The opinion of BRACKENRIDGE, J. is to the same effect. *Ib.* 190. The only ground, on which such surveys could have been maintained, is, that of a custom or usage, which existed in early times, on payment of £5, and surveying fees: a custom which

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was recognized as valid in *Woods's lessee v. Galbraith*, 2 Yeates, 306, in the case of a survey made in the year 1745; but does not apply to a survey made as late as 1770. The exception, however, proves the general rule, which is, that the act of an unauthorised deputy surveyor is altogether void. *Heuly v. Moul*, 5 Serg. & Rawle, 181.

The survey, therefore, being void, for want of an authority, there was no ground from which an authority could be legally presumed. The possession was not ancient, it was but thirty years; which is not long enough to presume a matter of record. In the *Mayor of Kingston v. Horner*, which is the leading authority on the subject of presuming a charter or patent, the possession was 350 years, and there were other circumstances, *Cowp.* 102. The time required to presume a patent, or grant of land from the state, is a great length of time. 1 *Phill. Ev.* 119. 2 *Hen. & Munf.* 370.

Chambers, contra. All the exceptions taken by the plaintiff, may be reduced to one point, namely, whether the length of time, and other circumstance were not sufficient to justify the court in admitting the survey, and leaving it to the jury to presume an authority in the assistant deputy surveyor to make it. The length of time within which a charter or official authority may be presumed, must depend upon the particular circumstances of each case. In questions of this kind, possession goes a great way, and there is no particular time within which a charter may be presumed. *Mayor of Kingston v. Horner*, *Cowp.* 110.

The law greatly regards the public safety and repose, and almost any thing will be presumed in favour of ancient possession. Patents and grants are presumed after 30 years, 3 *Johns. Cas.* 117. *Garwood v. Dennis*, 4 *Binn.* 337. *Lowrey v. Gibson*, 2 Yeates, 84. Slight circumstances will be taken hold of. In *Garwood v. Dennis*, recitals in deeds were held evidence after long possession. In *Evans v. Nargong*, 2 *Binn.* 55, a presumption was raised, that one person was the owner of a warrant issued in favour of another, from attending and directing the survey, and from other circumstances. In *Galloway v. Ogle*, 2 *Binn.* 468, 40 years were held sufficient to create a presumption of a conveyance of unpatented land. In relation to land titles in *Pennsylvania*, there has been much latitude allowed. In *Bell's lessee v. Levers*, 3 Yeates, 25, the Chief Justice says, in charging the jury, that the authority of a deputy to make surveys, should not be too closely scrutinized, after so great a lapse of time as 27 years. At so early a date as 1763, it was decided by the Supreme Court, that a letter of *James Steel*, receiver general, and secretary of the land office, was a sufficient authority, *Fothergill's lessee v. Hoover*, 1 *Dall.* 6, and in 1774, the list of first purchasers was held evidence of the former existence of a lost deed, *Hurst v. Deppo*, 1 *Dall.* 20. The general doctrine as to presumption is stated by the Chief Justice in *Mather v.*

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The Ministers of Trinity Church, 3 Serg. & Rawle, 510. "There is no absolute time required by law, on which to found this kind of presumption. Circumstances may require, in different cases, a different length of time," and in that case, a grant, or pre-emption right from the commonwealth, was presumed after 90 years possession, though no trace of such right was shown by any writing or other evidence. The doctrine of presuming a grant or right after a lapse of time is, by modern decisions, extended to every subject: to the case of an easement after 20 years possession, 2 *Saund. 175, A. note*; to a rent, 1 *Mudd. Ch. 25*, and payment of rent is presumed after that period, 16 *Johns. 210*; after 14 years possession regular re-entry by the landlord is presumed, 2 *Caines, 382*. In the present case, the survey was made in the year 1770, upwards of 50 years before the trial: and in a deed dated the 3d November, 1773, the survey by *Lyon* is recited. The survey itself was preserved for 30 years in the office of the deputy surveyor. There were buildings on the land 30 years ago; and it was occupied before that period by *Carpenter* as woodland, and as appurtenant to his farm: showing a possession by him for 39 years.

Crawford, in reply. The occupation in the present case was equivocal: it consisted in cutting wood. The deed by *Isaac Baird* in 1773, recites *Lyon's* survey, but not any warrant or location, and it is for this purpose that some evidence is sought, and not as to the survey, which is sufficiently proved.

The opinion of the court was delivered by

DUNCAN, J. Both of the exceptions relied on contain exactly the same point—the effect of length of time in presuming the existence of a location on which the survey for *Isaac Baird*, under which the defendant claims, might have been made. The facts from which the presumption is said to arise, are: There has been possession for more than 30 years, according to the survey; the memorandum at the foot of which recites, that it was made on an order for 300 acres, but without mentioning the date of the order, or the name of the owner. The survey is in the hand writing of *Samuel Lyon*, at that time an assistant of the deputy surveyor of the district; and has indorsed on it, (also in the hand writing of Mr. *Lyon*,) "copied for return:"—and added to this the paper is found in the office of the deputy surveyor of the district. These circumstances could not be received as presumptive evidence for the jury to draw the conclusion as matter of fact; for if the existence of the location be admitted, some account of its loss would have to be given before secondary evidence of its contents could be received; without which the survey would be inadmissible for want of a previous authority. Besides, there is nothing but the assertion of the assistant deputy, to show that the making of the survey was any thing else than an extra-official act; and the assertion or declaration of a deputy, except

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where it is made in the discharge of an official duty, and is part of the *res gesta*, as in the case of a receipt for fees given when the fees are paid, is not competent evidence. But before the declaration can be received as part of an official act, the act itself must appear by evidence *aliunde* to have been official; for it would be arguing in a circle to say, that Mr. *Lyon's* assertions are evidence, because he acted by authority, and that he did act by authority is proved by those assertions. Nor is the case strengthened by the circumstance of Mr. *Lyon* having been in the employment of the deputy, and the paper being found in the deputy's office: I would consider it to be the same if the survey were in the hand writing of the deputy himself. His having seen and recognized the survey could give it no additional force: it might be otherwise if it were received in the land office. It would be dangerous to consider every paper found in a deputy's office as official of course; whether it had relation to the execution of his office or not. His power is derivative, and unless something appear to raise a presumption that he acted by authority, his act will not bear an official stamp merely because he filed the evidence of it with his official papers. As presumptive evidence to satisfy the jury of the truth of the facts, therefore, the paper was in every view inadmissible.

But it is contended, that be this as it may, possession having accompanied the survey for something more than 30 years, is sufficient to raise a *legal* presumption of an authority on which it may rightfully have been made. Presumptions from length of time are those which the law makes without regard to what may have been the actual state of the fact. They are conclusions of law, not of fact; and neither the court nor the jury is supposed to believe what they take to be conclusively established as true. The particular circumstances of possession and length of time are to be determined by the jury; but the inference from them is for the court. This principle of decision is had recourse to from necessity, because, from the remoteness of the period of the supposed transaction there is no means of ascertaining the actual state of the fact; and it therefore holds in judging only of things which belong to antiquity. In England a grant may be presumed against the Crown; but less readily than against an individual. In this state, from the very nature of our land titles, the reason of this difference holds with additional force. In other countries, holding by permission of the state is a rare circumstance: with us holding by permission under an implied contract for a conveyance to be executed at an indefinite period subsequently, is a common origin of title. This remark is applicable in a greater or less degree to every part of the state: but it is obvious that to raise this kind of presumption a greater length of time will be required, where the population is sparse, and the possession a matter of little notoriety, than where the population is dense, and possession of a nature to arrest the general attention. In *Mather v. The Mini-*

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sters of *Trinity Church*, the land which was the subject of the presumed grant, lay in the neighbourhood of *Philadelphia*. the oldest and most thickly inhabited part of the state; and the occupancy of it by the erection of a church on it, in which divine service was regularly celebrated, and by using a part of it as a cemetery, was of a nature so notorious as to preclude all possibility of its having been unknown to the proprietary officers, or to the government, after the proprietary estates were assumed by the commonwealth. Under these circumstances it was held that a grant ought to be presumed after 90 years. At the time, too, when this possession commenced, there was scarcely any thing like method in the issuing of rights to land: after the application system was introduced, the business of the land office was conducted with regularity, and the locations were duly registered in the proper office. To this may be added that the location in question, if in fact one ever existed, was for land in a part of the state comparatively new and thinly inhabited, where taking possession without a grant, was a common mode of laying a foundation for a title; and that the occupancy in this particular instance was attended with no peculiar circumstances of notoriety. It is impossible to lay down any rule on the subject of presumptions, which could be safely applied to any thing like a majority of the cases that may arise, these must be judged of from their particular circumstances. As a standard for general reference, the ordinary period of human existence, might perhaps be found more convenient in practice, and thought more consistent with the reason of the thing than any other that could be proposed; for while a matter may be susceptible of proof by living witnesses, it cannot be classed with the things of antiquity. But this is thrown out merely by way of suggestion. We establish no general rule as to presumptions against the commonwealth: much less do we pretend to determine what would be a reasonable period as against an individual. We are of opinion the period of 30 years was insufficient to raise a presumption of the existence of a location, or any other authority, on which *Baird's* survey might have been made; and consequently that the survey ought not to have gone to the jury: and that even if it might rightly have been admitted, instructing the jury that there was nothing in the way of a presumption in favour of the existence of a location, was error.

Judgment reversed and a *venire de novo* awarded

[CHAMBERSBURG, OCT. 21, 1822.]

KNOX *against* RINEHART.

IN ERROR.

In covenant on an agreement to make the plaintiff a title on a day certain, in consideration of which he was to give bonds, if he aver a readiness to perform, and the defendant puts in issue, by his plea, the plaintiff's readiness to perform, it is sufficient on the trial, if the plaintiff show that the defendant had no title on the day : he is not bound to show performance or tender.

ERROR to the Court of Common Pleas of the county of *Cumberland*.

Covenant in the court below, by *Barnhart Rinehart* against *Joseph Knox*. The first count of the declaration set forth articles of agreement between the parties, dated 29th *Dec.* 1808, by which it was agreed, that the said *Joseph* should and would, on the first of *April* ensuing, by a good and sufficient title with a general warranty, (quit rents excepted,) well and sufficiently grant, convey, and assure unto the said *Rinehart*, his heirs, and assigns, a certain tenement and lot of ground in *Carlisle*; in consideration whereof, the said *Rinehart* covenanted, that he should and would, well and truly pay, or cause to be paid, to the said *Knox*, £900, in manner following. *viz.* 100 dollars in hand; 900 dollars on the 1st *April*, next ensuing, and the residue in four equal annual payments from the said day; and that he would give security for the instalments. *Breach*, that though the said *Rinehart*, from the time of the making of the said agreement, hath always, hitherto, been ready to perform all and singular those things in the same agreement contained, which, on his part, were to be performed, according to the true intent and meaning thereof, yet the said *Knox* had not conveyed the said tenement and lot of ground, &c. though requested, on the said first day of *April*, 1809, &c. The second count stated, that the defendant had not good right, power, or lawful authority, to convey the premises to the plaintiff. The defendant pleaded covenants performed, with leave to give the special matters in evidence, *absque hoc*, &c. and *non infregit conventiones*.

On the trial, the articles of agreement as set forth in the declaration were proved, and it appeared, that the plaintiff had paid 100 dollars on the execution of the articles, and on the 1st of *April*, 1809, tendered 900 dollars to the defendant, and demanded a deed. The defendant, however, did not execute any deed, stating, that he had not then the title. It appeared, that in *November*, 1809, three months after this suit was brought, the defendant acquired the legal title to the premises.

In answer to a question put by the defendant, the court charged the jury, that it was not incumbent on the plaintiff, under the circumstances of the case, to have tendered bonds with security, for the instalments, prior to the commencement of this suit. The de-

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defendant's want of title, and his acknowledgment of this, on the tender of the 900 dollars, absolved the plaintiff from the necessity of tendering bonds.

The jury gave a verdict for *Rinchart*, the plaintiff below, for the 100 dollars paid and interest, and judgment was rendered thereon.

Error was assigned in the charge of the court, and

Carothers, for the plaintiff in error, contended, that the plaintiff was not entitled to recover, without showing, that he did every thing which he had covenanted to do. He ought, therefore, to have shown, a tender of bonds for the instalments of the purchase money, as well as of the 900 dollars. The payment and security of the purchase money are conditions precedent; and the plaintiff must show, that he did all in his power towards performance of the conditions. He avers in the declaration, that he was ready to perform, and this averment is traversed by the plea. He cited 2 *Powell on Cont.* 19. *Zerger v. Sailor*, 6 *Binn.* 24.

Mahon and *Metzgar*, contra, insisted, that the covenants were independent. The conveyance was first to be executed, and afterwards, on the same day, the purchase money was to be secured. The plaintiff, therefore, avers, not that he had performed or tendered, but that he was ready: he is not bound to show performance. They cited, 1 *Esp. N. P.* 135. 2 *Johns.* 272. *Wilcox v. Ten Eyck*, 5 *Johns.* 78. 8 *Johns.* 257. 1 *Saund.* 320. 15 *Johns.* 303.

Carothers, in reply, observed, that if it were true, that the covenants were independent, *Knox* might recover the purchase money, although he could not make a title.

The opinion of the court was delivered by

GIBSON, J. It is unnecessary to decide, whether a tender of bonds according to the plaintiff's covenant, was a condition precedent to bringing suit: the affirmative of that question seems to be conceded on the pleadings; and for the purposes of the argument I shall consider the covenants as dependent. The plaintiff averred, that he had always been "ready to perform all and singular those things in the same agreement contained, which on his part were to be performed, according to the true intent and meaning thereof;" but without averring actual performance or a tender, or setting out, as he ought to have done, the circumstance on which he relied at the trial as a valid excuse for the want of either, and which was in fact so—the conceded inability of the defendant to convey an unimpeachable title at the time stipulated: for without showing something to excuse actual performance or a tender, an averment of mere readiness and willingness is insufficient on demurrer, or in error, where the judgment is by default. The defendant pleaded *covenants performed*, and *non infregit conventiones*, with a special traverse of the plaintiff's averment. Now all that was put in issue, by this, was the plaintiff's readiness: not actual performance

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on his part, or a tender of performance. Proof of the facts, required by the defendant, would therefore not have been pertinent. Suppose the matter of excuse had been pleaded properly—it will not be contended, the plaintiff would still have to prove performance or a tender; and if it be pleaded defectively, that will not change the nature of the proof: the plaintiff will have to prove the matter of excuse, just as if it were well pleaded; and it is precisely for this reason a defective averment of this sort, is held good after verdict. I can therefore see no error in the direction to the jury.

Judgment affirmed.

[CHAMBERSBURG, Oct. 21, 1822.]

PATTON and others *against* GOLDSBOROUGH.

IN ERROR.

Parol evidence of the declarations of the grantor is admissible, to prove the identity of a lot referred to in a deed by him, conveying certain “lots in the town of H. marked on the recorded plan of the said town;” notice having been given to one of his executors, a defendant in the suit, and he having sworn that he never saw any such recorded plan, and the records of the proper county having been diligently searched, without finding any recorded plan.

Where three executors were defendants, who had been notified on a former trial between the parties, to produce a paper, and on the present trial one of them had been notified, who swore, that he had made inquiry of the other members of the family, and diligent search had been made, and the paper could not be found, and the deed of the testator, under which the plaintiff claimed, referred to the paper, the notice was held sufficient.

Confessions by a grantor, that he had conveyed a certain lot, are evidence against him and his executors, of the identity of the lot referred to in the deed; but evidence of declarations or acts of such grantor, subsequently to his deed, is not admissible to defeat the grant, by showing that it was not the lot referred to.

Where both plaintiff and defendant derive title from the same person, who had been seised of the premises, it is not necessary that the plaintiff should show a title out of the commonwealth.

ERROR to the Court of Common Pleas of *Huntingdon* county, in an ejectment brought by *William Goldsborough* against *William Patton*, and *Richard Smith*, *Charles Smith*, and *Benjamin R. Morgan*, executors of Dr. *William Smith*, deceased, tried before a special court held by REED, president, and the associate Justices of the Court of Common Pleas of *Huntingdon* county, under the act of assembly providing for holding special courts. A verdict and judgment passed for the plaintiff below.

The ejectment was brought to recover a house and lot in the town of *Huntingdon* marked No. 11 in the town plot, which had formerly, among others, been the property of Dr. *William Smith*, under whom the plaintiff, who was his grandson, and also the defendants claimed. On the 15th May, 1783, Dr. *Smith* executed a deed to his daughter, *Williamina Elizabeth Smith*, the plaintiff's mother, granting to her, among other things, “four

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lots in the town of *Huntingdon*, in the county of *Bedford*, marked on the recorded plan of the said town with the name of the said *Williamina Elizabeth Smith*:" and the main question between the parties was, whether lot No. 11, was one of those embraced in this deed. The present county of *Huntingdon* composed in the year 1783, part of the county of *Bedford*.

The plaintiff gave notice to *Richard Smith*, one of the defendants, who resided in the town of *Huntingdon*, to produce, on the trial, the town plan referred to in his father's deed, and proved, that after a diligent search among the records of *Bedford* county, no plan of the town of *Huntingdon* was to be found of so early a date as the year 1783. A plan was produced on the trial by *Richard Smith*, which had been recorded in the year 1795, and also, several other plans not recorded; but he declared, that he never saw such a plan as that which was mentioned in his father's deed to his sister *Williamina*, nor could he find any record of it. The plaintiff then offered parol evidence, of repeated declarations by Dr. *Smith*, both before and after the building of the stone house on the premises, which he erected some time after the year 1790, "that the lot for which the ejectment was brought, being distinguished by the number 11, on the recorded plan produced by the said *Richard Smith*, was one of the four lots conveyed to his daughter by the deed of *May*, 1783, before mentioned." This evidence was objected to by the defendants, but admitted by the court, who sealed a bill of exceptions.

The defendants offered in evidence a book, which had belonged to Dr. *Smith* and was in his hand writing, entitled by him, "A Book of land property, begun at *Philadelphia*, *January 1st*, 1767." It contained, among other things, an account of the property conveyed to each of his children. In the list of property conveyed to his daughter *W. E. Smith*, were five lots in the town of *Huntingdon*, neither of which was No. 11, the lot now in dispute. The book was produced by *Richard Smith*, who proved that he had received it from his brother *Charles Smith*, and that it was in the same condition at the trial as it was when he received it from his brother. The leaves of this book from page 55, to page 66, had been torn out, but were all produced with it, except the leaf containing pages 60 and 61; and on the leaves thus produced, which had been torn out, there was the following indorsement, in the hand writing of Dr. *Smith*; "those taken from Book of Property and paged to be restored to their place." The plaintiff objected to the admission of this book in evidence, and the court rejected it, and sealed a second bill of exceptions taken by the defendants.

A third, fourth, and fifth bill of exceptions were taken to the following evidence offered by the defendants, and rejected by the court. 1. A letter from *Thomas D. Smith* (a son of Dr. *Smith*), to his father, dated *September*, 1786, which was indorsed by Dr.

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Smith and proved by *Richard Smith* to have been received from his father, to assist in making out a list of the rents of the town of *Huntingdon*. In this letter *Thomas D. Smith* spoke of the lot No. 11, now in dispute, as his property. 2. A paper in the hand writing of *Dr. Smith*, dated in the year 1802, in which the house and lot in question were spoken of as his own property, (his son *Thomas D. Smith* being then dead.) 3. A plan of the town of *Huntingdon*, made by *Richard Smith*, under the direction of *Dr. Smith*, in the year 1791.

Certain points were proposed to the court by the defendants, the answers to which were excepted to.

1st Point.—Answer of the Court. If there was an actual adverse possession for 21 years before the ejectment brought, it follows, that the plaintiff cannot recover. If the testimony of *A. Dean*, *D. McMurtrie*, and *R. Campbell*, be believed, the presumption of adverse possession is repelled: for they state, in substance, that *Dr. Smith* at various times, admitted a previous sale of the lot in question by him to his daughter, and that the house he was about to build, or had built, was on the lot, and intended for her child. If the jury believe the evidence, the statute of limitations is no bar to the plaintiff.

2d Point.—Answer of the Court. Parol testimony respecting grants of real property, is not so safe as written: for the best memories, at times, will deceive the most cautious witnesses. But it may often be very certain and conclusive, and is not *always* to be considered *dangerous*. A jury should always weigh “with great caution,” all the evidence in the case. And we may add, that if the jury can believe, that the lot in question was granted to *Thomas Duncan Smith*, in 1783, before the alleged grant to *Williamina Smith*, then the plaintiff could not recover. But on what evidence are you to believe, there was such a grant to *Thomas D. Smith*? The entry of his name in the old plan produced, with the other papers and deeds is far from being conclusive of such grant.

*5th Point.—*That the plaintiff must recover on the strength of his own title; and the plaintiff, not having given *B. R. Morgan* and *Charles Smith*, notice to produce drafts and papers, they or either of them were not bound to appear in court, and swear, that they had no plan of the town of *Huntingdon*, prior to 1783, in their possession; and that the jury are not authorised by law to infer, that there is a plan in their power or possession, with the name of *Williamina Elizabeth Smith*, for the lot in question, no notice having been proved to have been served on them by the plaintiff in this suit.

Answer of the Court.—The plaintiff must recover on the strength of his own title. *Benjamin R. Morgan* and *Charles Smith*, the other executors, were not “bound to appear in court, and swear

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that they had no plan of the town of *Huntingdon*, prior to 1783, in their possession." But although they were not *bound* to appear, they had a *right* to appear, and prove the fact; and it would have been more satisfactory both to the court and jury, if those gentlemen had communicated their knowledge upon the trial, either establishing that there was, or was not such a plan as is referred to in the deed of 1783. The notice read is dated the 9th *September*, 1821, and only served on *Richard Smith, Mr. Morgan, and Charles Smith*; the other executors, were one at *Lancaster*, the other at *Philadelphia*. No opportunity was therefore afforded for them to produce any papers under it; and without such notice, they were not bound to produce any thing that would make against their claim. The law, therefore, does not authorise the jury, from these circumstances alone, to infer, that there is a plan in their power or possession, with the name *Williamina Elizabeth Smith*, inscribed for the lot in question.

6th Point.—That the declaration of *Doctor Smith*, that he was building the stone house for his grandson, does not in law vest any title in that grandson to the lot in question.

Answer of the Court.—It is not contended, that the declarations of *Doctor Smith*, that he was building the stone house for his grandson, vests any title in law, in that grandson, to the lot in question. The deed of 1783 refers to a plan of the town, and to four lots with the name of the grantee inscribed. That plan, if it existed, has not been produced. The evidence of *Doctor Smith's* declarations was only offered to identify one of the lots alleged to be granted by the deed. If identified, the title would pass by the deed; not by the subsequent declarations of the grantor, but in virtue of the deed itself.

7th Point.—That the plaintiff cannot recover, never having been in possession, nor not having shown any grant to *Doctor Smith*, or title out of the commonwealth.

Answer of the Court.—If no adverse possession has been shown in the defendants, or those under whom they claim, the want of a previous possession in the plaintiff is of no consequence. Both parties claim under *Doctor W. Smith*. The town of *Huntingdon* was laid out by him. The drafts and evidence all show, that both parties claim under him. We think, therefore, it was not necessary on the part of the plaintiff to show a grant of *Doctor Smith*, or that the title is out of the commonwealth.

Shippen and Burnside, for the plaintiffs in error.

1. The evidence of the declarations of *Dr. Smith* ought not to have been admitted by the court below. It was improper for several reasons. Previous proof had not been made that any town plot of the kind referred to in the deed had ever existed, and been lost. The deed may be considered as absolutely void, because there was no recorded town plot to identify the property conveyed. Where

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there was a blank left in a will for the legatee's name, parol evidence to supply it was rejected, *Phill. Ev.* 418. But, at all events, secondary evidence was not admissible of the contents of such plot, till its existence and loss were first proved. There was a want of due diligence on this head in the plaintiff. Notice to produce it was not given to two of the defendants, *Charles Smith* and *Benjamin R. Morgan*, who it appears lived, the former at *Lancaster*, and the latter at *Philadelphia*, nor to any of the representatives of the Dr. *Smith*, except one of the defendants *Richard Smith*, who resided in *Huntingdon*; and that notice was given only eight days before the trial. Whoever would give parol evidence of the contents of a deed or other instrument, must entitle himself thereto, on the ground of its being lost or destroyed, or in the possession of the adverse party, and must further show that notice had been given to him to produce it. The law abhors nothing more than giving parol evidence of written papers. *Campbell v. Wallace*, 3 *Yeates*, 271. No parol evidence can be given of a fact concerning which there is a writing in existence, *McKinney v. Leacock*, 1 *Serg. & Rawle*, 27. This evidence was objectionable, also, because it went to contradict the written evidence produced by the plaintiff; namely, the town plot of 1776, in which the name of *Thomas D. Smith* was marked on this lot, and the recorded plot of 1795. Parol evidence is not admissible to contradict a deed or other writing. 6 *Binn.* 483. 4 *Cranch*, 224. 2 *W. Bl.* 1249. 1 *Wils.* 34. 1 *Binn.* 610.

2d, 3d, 4th, and 5th bills of exceptions. These bills of exceptions all depend on the same principle. Our evidence of the acts and declarations of Dr. *Smith* ought to have been received to rebut the parol evidence of his declarations, which had been admitted on the part of the plaintiff. It was all of the same character; it was secondary evidence resorted to ascertain the meaning of the deed, and the identity of the lot meant to be conveyed by Dr. *Smith* to his daughter, and therefore all to be considered and weighed by the jury. The book of property was strong evidence on this subject, and existed prior to the deed. The leaves cut out were indorsed by Dr. *Smith*, and directed to be inserted according to the pages marked on them. Whether he withdrew the lost leaf, whether its contents were material, and the weight due to the evidence contained in the book, ought to have been left to the jury to determine.

Charge of the Court.—1st point. The court erred in their answer respecting the statute of limitations.

2d Point.—The court stated their opinion of the evidence too strongly, when they said, that the evidence produced was far from being conclusive, that Dr. *Smith* had made a grant to *Thomas D. Smith*.

4th and 5th Points.—On these points, the court did not give a full and fair answer. The judge said, that *Charles Smith* and *B. R. Morgan*, were not bound to appear in court and produce

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papers: and yet, that it would have been more satisfactory if they had appeared.

7th Point. The court below erred on this point. The general rule is, that the plaintiff in ejectment, need only show his title as far back as the person who died last seised, first showing the estate to be out of the proprietaries, or the commonwealth. *Shrider's lessee v. Nargan*, 1 *Dall.* 68.

Todd and S. Riddle, contra.

1. The parol evidence produced by the plaintiff, was for the purpose of proving the contents of a lost writing. The existence of such writing was proved by the deed itself: though it appears Dr. *Smith* was mistaken as to the fact of its being recorded. Not being on record it would naturally pass from him into the hands of his executors. It is objected, that the notice to produce it should have been given to all the executors. In answer to this objection, it is to be observed, that on a former trial of this cause, in the year 1817, when a verdict was rendered for the plaintiff, on condition that he should pay for the value of the house, which was afterwards set aside, notice was given to all the defendants, to produce this writing. And in the present case, notice was given to *Richard Smith*, who stated that he had inquired of the rest of the family, and they could find no such plot as that referred to in the deed. Under such circumstances, the want of formal notice to them, cannot be complained of. Besides, the exercise of due diligence to obtain a paper is a matter of fact, for the sound discretion of the court below, and, after hearing the whole case, they decided, that proper diligence had been employed by the plaintiff. Nor was this objection made previous to the admission of the evidence, that no notice had been given to two of the executors. The deed, on its face, was uncertain, and was to be rendered certain in relation to the property conveyed by other evidence. To explain a latent ambiguity parol evidence is admissible. *Phill. Ev.* 410, 412.

2d, 3d, 4th, and 5th bills of exceptions. As to the declarations of Dr. *Smith*, the distinction is, that though a man's declarations are evidence against him, or those claiming under him, they are not evidence for him to destroy his prior grant. All the declarations and acts of Dr. *Smith*, which we objected to, were after the date of the deed: we made no objection to any that had occurred before. It is a sufficient reason to set aside the Book of Property, that it was produced in a mutilated condition.

The court then told the counsel they need not speak to the remaining points.

The opinion of the court was delivered by

TILGHMAN, J. C. This is an ejectment brought by *William Goldsborough*, the plaintiff below, against the executors of the late *Rev. Dr. William Smith*, deceased, for a house and lot in the town of *Huntingdon*. Both parties claimed under *Doctor Smith*,

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and the principal question was, whether the lot in dispute, being distinguished by the number 11, in the town plot, was included in a deed from the *Doctor*, to his daughter *Williamina Elizabeth Smith*, deceased, dated the 15th day of *May*, in the year 1783. On the trial of the cause, the defendant's counsel took five bills of exceptions to evidence, and five exceptions to the charge of the court. In *Doctor Smith's* deed to his daughter, which was given in evidence by the plaintiff, who claimed under it, he grants to her among other things, "four lots in the town of *Huntingdon*, in the "county of *Bedford*, marked, on the recorded plan of the said "town, with the name of the said *Williamina Elizabeth Smith*." The plaintiff served a notice on *Richard Smith*, one of the defendants, who resided in the town of *Huntingdon*, to produce the town plan referred to in his father's deed, and proved, that after diligent search among the records of *Bedford* county, no plan of the town of *Huntingdon*, was to be found of so early a date as the year 1783. *Richard Smith* produced a plan which was recorded in the year 1795, and several others not recorded; but declared that he never saw such a plan as that which was mentioned in his father's deed, to his sister *Williamina*, nor could he find any record of it. The plaintiff then offered to prove, by parol evidence, repeated declarations of *Doctor Smith*, both before and after the building of the stone house, which he built on the lot in dispute sometime subsequent to the year 1790, "that the lot for which this ejectment was "brought, being distinguished by the number 11, on the recorded "plans produced by the said *Richard Smith*, was one of the four lots "conveyed to his daughter, by the deed of *May* 1783, before mentioned." To this evidence the counsel for the defendants, objected, but the court admitted it, and an exception was taken to their opinions.

The lots conveyed by *Doctor Smith* to his daughter, could not be ascertained by any thing which appeared on the face of the deed. It was necessary therefore to go out of the deed, and have recourse to the recorded plan, to which it referred—but no such plan was to be found. What then was to be done? *Dr. Smith* appears to have been mistaken in referring to a *recorded* plan. He might have deposited one in the recorder's office, for the purpose of being recorded, but there is no reason to suppose that it ever was recorded, because there was no proof that any of the records of *Bedford* county had been lost. But the deed is not to be defeated by a mistaken reference of this kind. In order to give it efficacy, it must be presumed, that at its date, a plan was in existence, in which the name of *W. E. Smith* was marked on four lots, and inasmuch as *Doctor Smith's* executors could produce no such plan, it may fairly be concluded that it was lost. In that case, the law admits parol evidence of its contents, and what evidence could be more proper, than the declarations of *Doctor Smith* who made the deed, and was proprietor of the ground on which the town of *Huntingdon* was laid

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out. He did not say expressly, that the plan referred to in his deed, was in his possession, but he said that the lot No. 11, was one of those which he had conveyed to his daughter. It was very proper that the jury should hear this evidence, from which they might draw their own conclusions. But it was objected by the defendant's counsel, that notice to produce the paper supposed to be lost, should have been served on *all* the executors of *Dr. Smith*, and not on *Richard Smith* only. In answer to this objection, it is to be observed, that *Richard*, who lived in *Huntingdon*, was the only executor who attended the trial, and he declared, on his examination, that he had made diligent search himself, *and inquired of the other members of the family*. There was no reason to think, therefore, that the defendants were taken by surprise, or that the other executors could have produced any other papers. Indeed, from the nature of *Doctor Smith's* deed to his daughter, which depended for its efficacy on a paper in the *Doctor's* possession, he stood pledged to produce that paper whenever called on by his daughter, or those claiming under her. And as this cause was tried once before, and a new trial ordered by the court, it must have been known perfectly well, by all the executors, that the plaintiff's case depended on the town plan referred to in their father's deed, and if either of them had it, it was his duty to produce it. The court below were satisfied, that every thing incumbent on the plaintiff, preliminary to the introduction of parol evidence, had been complied with, and there is nothing on the record which induces me to be of a contrary opinion. The defendant's counsel urged another reason against this parol evidence, *viz.* that it contradicted the written evidence produced by them; meaning a town plan produced by *Richard Smith*, in which the name of *Thomas D. Smith*, (a son of *Dr. Smith*) was marked on the lot No. 11. If the plan produced by *Richard Smith*, had been the one referred to in the *Doctor's* deed, there would have been weight in the objection. But it was not. The plaintiff did not recognise the plan which was produced, as any part of his title, and so far as concerned the lot No. 11, he was at full liberty to contradict it, by parol evidence. If he could satisfy the jury, that in the plan referred to in *Doctor Smith's* deed, the name of *W. E. Smith* was written on the lot No. 11, his title would be established, in spite of any other name which might have been written on the same lot, in any other plan. I am therefore, of opinion, that the parol evidence was properly received.

The 2d exception was to the opinion of the court in rejecting a book offered in evidence by the defendants, in the hand writing of *Dr. Smith*, and called his *book of property*. In this book, the *Doctor* made entries from time to time, touching the disposition of his property; it was produced by *Richard Smith*, who proved that he had received it from his brother *Charles*, and that it was in the same condition at the trial, in which he received it from his brother. The leaves, from page 55 to page 66, had been torn out, but were

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all produced, except pages 60 and 61—and on the torn leaves which were produced, was an indorsement in the hand writing of *Dr. Smith*, directing in what part of the book they were to be replaced.

However reputable the persons through whose hands this book had passed, the court was right in not permitting it to be read in evidence. Two pages were still wanting, and who could say, what those pages might contain. It would be unjust to affect the plaintiff's title by a mutilated book, which might have been in his favour if the whole had appeared—whether the book would have been evidence, if it had been entire, I am not prepared to say. But, as it was, it was properly rejected.

The 3d, 4th, and 5th exceptions, depending on the same principle, may be considered together. The defendant offered in evidence the following papers—1. A letter from *Thomas D. Smith*, deceased, (a son of *Dr. Smith*) to his father, dated *September, 1786*—on this letter was an indorsement in the hand writing of *Dr. Smith*, and *Richard Smith* proved, that he received it from his father, to assist in making out a list of the rents of the town of *Huntingdon*. *Thomas D. Smith* in this letter, spoke of the lot in dispute, as *his* property.—2d. A paper in the hand writing of *Dr. Smith*, dated in the year 1802, in which the house and lot in question are spoken of as *his own* property, (his son *Thomas D. Smith* being then dead.)—3d. A plan of the town of *Huntingdon* made by *Richard Smith*, under the direction of *Doctor Smith*, in the year 1791. These three papers were objected to by the plaintiff's counsel, and rejected by the court. The objection to them was, that they were acts, or declarations, of *Doctor Smith*, subsequent to his conveyance to his daughter. It was a good objection; for no man shall be permitted to defeat his own grant by subsequent declarations. A man's confessions are evidence *against* him, but he cannot make evidence *for himself* by counter declarations. On this principle, the declarations of *Doctor Smith*, that he had conveyed the lot to his daughter, were evidence against him, and against his executors who claim under him. When a confession is given in evidence, the whole of it is to be taken together. But a confession made at one time, cannot be rebutted by a declaration at another time, because, if that were permitted, a man might always destroy his confessions, by subsequent declarations to the contrary. The papers offered in evidence therefore, which tended to show a title in *Doctor Smith*, could not be admitted, in order to rebut the parol declarations by which he had confessed the title to be in his daughter.

The charge of the court remains to be considered. The 1st exception is, to what was said on the subject of the act of limitations. The charge was, "that if there was 21 years adverse possession against the plaintiff, he ought not to recover; but that if the evidence of *Alexander Dean, David M'Murtrie, and Robert*

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“*Campbell* was believed, the presumption of adverse possession “was repelled; because these witnesses swore, that *Dr. Smith*, at “various times, admitted that he had conveyed the lot in question “to his daughter, and that the house he was about to build, or had “built upon it, was intended for her child”. Now who can deny that this evidence destroyed all presumption of adverse possession. The matter is really too plain to admit of argument. The 2d exception is, to that part of the charge, in which it is said, “that if the lot in “question was granted by *Dr. Smith*, to his son *Thomas D. Smith*, “in 1783, before the alleged grant to his daughter *Williamina*, “then the defendant could not recover; but that the name of *Thomas D. Smith*, entered in the old plan which had been produced, “with the other papers and deeds, were far from being conclusive “evidence of such grant to the said *Thomas D. Smith*.” The defendants’ counsel complains, that the court stated their opinion of the evidence too strongly. I cannot say that I think so. Indeed I do not see how the court could have said less. The evidence was certainly very far from being conclusive. But it was left to the jury to estimate it according to their own opinion. No conveyance to *Thomas D. Smith* was given in evidence. But there were circumstances in favour of his title, which were contradicted by other circumstances in favour of the title of *Williamina Smith*. The evidence could not properly be said to be *conclusive* on either side. The two next exceptions are, to the answers given by the court, in their charge, to the 5th and 6th propositions of the defendant’s counsel, on which the opinion of the court was required. The objection is, that the propositions was not answered fully and fairly. It is a vague kind of objection. I will not say that it was not possible to give a more explicit answer. But I think it was sufficiently certain, and what the jury could not misapprehend. And it is not contended that there is any thing against law in it. It is plainly enough expressed, that the jury are not to presume, that those executors of *Doctor Smith*, on whom a notice to produce papers was not served, had in their possession, the town plan to which the *Doctor’s* deed referred—and that the declarations of *Dr. Smith*, that he was building the stone house for his grandson, did not vest any title in that grandson to the lot in question. These were substantial answers to the defendant’s 5th and 6th propositions. The last exception to the charge is, on the answer to the defendant’s 7th proposition. The proposition was, “that the plaintiff cannot recover, having never been in possession, and not having shown any grant to “*Dr. Smith*, or title out of the commonwealth.” The court answered, “that the defendant’s objections were not valid, because both parties “claimed under *Doctor Smith*, and his possession was not adverse “to this.” The answer was right. According to the testimony of *Dean* and others, the possession of *Dr. Smith* was in accordance with his daughter’s title. And as to a grant to him from the commonwealth, no positive proof of it was necessary, because both par-

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ties affirmed that he was seised of the ground on which he laid out the town of *Huntingdon*, and both gave evidence of title in themselves derived from him. Upon the whole then, I am of opinion that there is no error in this record, and therefore the judgment should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCT. 21, 1822.]

LEHN *against* LEHN, administrator of LEHN.

IN ERROR.

In a suit for money lent, an indorsement on a bond given after the loan, by the plaintiff to the defendant, that suit was brought on the bond, is not evidence on behalf of the defendant of that fact.

But an indorsement on the bond of a receipt of a sum equal to the amount loaned, with interest to the time of the receipt, is evidence to show an extinguishment of the loan, and unless explained, is conclusive.

The administration account is not evidence on behalf of the administrator, to show that there was no debt due from the intestate to the plaintiff.

ERROR to the Court of Common Pleas of *Cumberland* county.

Debt, to recover the sum of 80 dollars, money lent, brought by *Jacob Lehn* against *John Lehn*, administrator of *Jonathan Lehn*, deceased. After the plaintiff had proved on the trial, the loan of this sum to the intestate, the defendant, under the plea of payment, with leave, offered in evidence a bond from the plaintiff to the intestate, dated the 31st *March*, 1810, (which was after the loan,) for the payment of 199 dollars 23 cents, on the 1st *April*, 1811. It was admitted, that this bond was executed by the plaintiff. The defendant further offered in evidence a receipt for 85 dollars, indorsed on the bond, and also an indorsement thereon, that suit had been brought on the bond in *Franklin* county to *April* term, 1811. The plaintiff objected to this receipt and indorsement, but the court admitted them in evidence, and the defendant excepted.

The defendant offered in evidence his own administration account on the estate of *Jonathan Lehn*, confirmed by the Orphans' Court of *Cumberland* county, on the 12th *December*, 1815, in which the defendant on the 1st *June*, 1811, had only charged himself with the sum of \$139 71, on account of the principal and interest then due on the bond above mentioned given by the plaintiff. This evidence was also excepted to by the plaintiff, and admitted by the court, who sealed another bill of exceptions. The verdict and judgment were rendered in favour of the plaintiff.

Alexander, for the plaintiff, in support of the errors that had been assigned, now contended,

(Lehn v. Lehn, administrator of Lehn.)

1. That the indorsement, stating that suit had been brought, was no evidence of that fact; it could only be proved by the record. *Vanhorn v. Frick*. 3 Serg. and Rawle, 278. 16 Johns. 137.

2. The administration account of the defendant was not evidence in his own favour.

Ramsey, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action brought by *Jacob Lehn*, against the administrator of *Jonathan Lehn*, deceased, to recover eighty dollars, lent by the plaintiff to the intestate in his life time.

The plaintiff proved the loan of the money; on which the defendant offered in evidence, a bond from the plaintiff to *Jonathan Lehn*, (dated subsequent to the loan,) for the sum of \$199 23, (which was admitted to have been executed by the plaintiff.) The defendant offered also in evidence a receipt indorsed on the said bond, for the sum of \$85, and another indorsement, by which it appeared that suit had been brought on the bond in *Franklin* county to *August* term, 1811. To all this evidence the counsel for the plaintiff objected, and on its being admitted, excepted to the court's opinion. The bond, with the receipt for \$85, was evidence, because they were in affirmance of the defendant's plea of payment. The sum of \$85, was about the amount of \$80, (the money lent by the plaintiff to *Jonathan Lehn*,) with interest from the time of lending. It was highly probable, therefore, that the receipt indorsed on the bond, was intended as an extinguishment of the loan. But this indorsement, mentioning that suit had been brought on the bond, was not evidence, because the record was better evidence of the bringing of the suit.

The defendant then offered in evidence, his own administration account on the estate of *Jonathan Lehn*, in order to show, that he had charged himself with no more than the sum of \$139 71, on account of the debt due from the plaintiff on his bond to *Jonathan Lehn*. This evidence was also excepted to. The evidence would have been in accordance with the receipt for \$85, indorsed on the bond; because, if nothing had been paid, there would have been a larger sum than \$139 71, due on the bond. But it was not legal evidence, because the exhibition of the administration account was the act of the defendant himself. It amounted to no more than his own assertion, and was not evidence for himself in the present action. The judgment must therefore be reversed, and a *venire de novo* awarded. At the same time, I cannot help saying, that the bond, with the receipt indorsed, without any other evidence, seem quite sufficient to defeat the plaintiff's action, unless he could show, that he made an actual payment of the \$85 mentioned in the receipt.

Judgment reversed and a *venire facias de novo* awarded.

[CHAMBERSBURG, OCT. 26, 1822.]

Commonwealth *ex relatione* DUFFY *against* the President and Managers of the Hanover and Carlisle Turnpike Road Company.

Same *ex relatione* the President and Managers of the Hanover and Carlisle Turnpike Road Company *against* CLARK, State Treasurer.

MANDAMUS.

The 77th section of the act for the improvement of the state, passed the 26th March, 1820, embraces those cases only, in which, by the other sections, there is no special appropriation of the money subscribed by the state, to future expenditures.

In such appropriations to future expenditures, the state treasurer is bound to pay the money subscribed, to the company: and it is no objection to such payment, that a contractor objects to it, who claims for work done before the passing of the act.

THE first of these cases was a rule, granted by this court at the instance of *James Duffy*, requiring the defendants to show cause, why a *mandamus* should not issue, commanding them to grant to the said *James Duffy* a certificate, issued by the president, attested by the treasurer, and sealed with the seal of the company, and transmit a duplicate of the same to the state treasurer, for the sum of 4,000 dollars, due and payable to the said *James Duffy*, by virtue of an act of assembly, entitled "an act for the improvement of the state," passed the 26th March, 1820.

In answer to this rule, the company showed for cause, that in the years 1812 and 1813, contracts were made for the formation of the turnpike road referred to, which was to extend from the town of *Hanover* to the borough of *Carlisle*: and a settlement took place between the company and *John Pedan* and *James Duffy*, (joint contractors,) on which a balance of \$3,000 appeared to be due from the company to them, for work done before that time: that no work had been done by *Duffy* and *Pedan*, or either of them, since that time: that *Pedan* had since died intestate, and his administrators had notified the company, not to pay any moneys to *Duffy*, but to pay them. They further returned, that in the year 1821, they contracted with *James Duffy*, for completing a further portion of the said road; but no work was done by him in performance of the contract. That they afterwards, at the instance of *Duffy's* security, rescinded the contract, and made a new one with *J. P. Helfenstein*: and had no knowledge of any agreement between *Helfenstein* and *Duffy*, till the time of the application by *Duffy* to the state treasurer, to obtain money in pursuance of it.

The second was a rule on *William Clark*, treasurer of the commonwealth, to show cause, why a *mandamus* should not issue, commanding him to pay to the president and managers of the *Hanover* and *Carlisle* turnpike road company, the sum of 4,000 dollars,

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pursuant to the provisions of the above mentioned act of assembly.

The treasurer showed for cause, by a return to the court, that true it was, the governor had drawn a warrant upon him on the 21st *May*, 1822, for 5,000 dollars in favour of the president and managers of the said company; but that *James Duffy* claimed 4,000 dollars thereof, and objected to the payment of the same to the company: that *Duffy* claimed under the articles of agreement between the company and him in 1821, above mentioned, and under other documents; and that the matter had been referred to the attorney general, who had given an opinion thereon.

It was admitted, that the road had been completed for the distance of 10 miles from the 15th mile stone, and that the governor had drawn two warrants in favour of the company, for 5,000 dollars each, of which 6,000 dollars had been paid to the order of the company, and 4,000 dollars still remained in the state treasury.

Mahon and *Carothers*, for the company.

Chambers and *Metzgar*, for defendants.

The opinion of the court was delivered by

TILGHMAN, C. J. *James Duffy*, to whom the defendants appear to be indebted in the sum of \$4,000, obtained a rule on them, to show cause, why a *mandamus* should not issue, commanding them to draw their certificate in his favour for that sum, directed to the treasurer of the commonwealth.

The case depends on the 57th and 77th sections of the "act for the improvement of the state," passed the 26th of *March*, 1821. By the 57th section, "the governor is authorised and required to subscribe on behalf of the commonwealth, to the stock of the *Hanover* and *Carlisle* turnpike road company, one hundred shares, to be expended in completing that part of the road, from the 15th mile-stone, across the *South mountain*, and as soon as the first 5 miles shall have been completed, the governor shall draw his warrant on the state treasury, in favour of the president and managers of the said company, for \$5,000, and on the completion of the second 5 miles, for the further sum of \$5,000." It is admitted, that the road has been completed for the distance of 10 miles, from the 15th mile stone, and the governor has drawn two warrants in favour of the company, for \$5,000 each, of which \$6,000 have been paid to the order of the company, and \$4,000 still remain in the treasury. By the 77th section of the act, it is enacted, "that it shall be the duty of the president and managers of the several turnpike road and bridge companies, to which the governor is authorised, by this act, to subscribe for stock, before they or any of them shall draw out of the state treasury, any part of the money subscribed, to settle the accounts of all such persons who may have

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heretofore performed work, &c. and to whom they are indebted for work done, &c. and who hold the accounts in their own right, without having heretofore made a transfer thereof to any other persons, and the amount due and payable to them respectively, shall be certified by the presidents and attested by the treasurers respectively, under the corporate seal, and a duplicate of each certificate shall be transmitted by the treasurer of each company to the state treasurer, and the certificate given to each creditor shall be received by the state treasurer, and paid by him to the holder thereof or his order, and the amount so paid, shall be deducted from the appropriations made to such company."

This act contains 77 sections, making appropriations for a great number of companies; and when it is considered that so many different interests were involved, each of which had its particular friends and patrons, in the legislature, it is no wonder, if there should appear some little incongruity in different parts of the act. But we must construe it, if possible, so as to avoid all inconsistency, and give operation to every part. It appears then, that there were two objects in view; one, to pay debts contracted by the companies, before the passage of the act, and another to complete certain roads which were in an unfinished state. Where the roads were already finished, it would be proper to apply the whole appropriation to the payment of debts. But where they were unfinished, it might be expedient to apply the appropriations in whole or in part, to *future expenses*, in order to accomplish the completion of the road. Accordingly, it will be found, that some of the appropriations are expressly applied to *future expenditures*, and in such cases, it would be defeating the intent of the act, to apply the money to the payment of *old debts*. The 77th section then, though general in its expressions, must be restrained, so as to embrace those cases only, in which there was no special appropriation of the money subscribed, to *future expenditures*, and can have no effect on the 57th section, by which it was directed, that the subscription to the *Hanover* and *Carlisle* turnpike road company, should be expended *in completing a certain part of the road*. Still the 77th section will not be nugatory, for it will apply to the greatest part of the money granted by the commonwealth for the improvement of the state. That this is the true construction of the law, is very clear, and therefore it is the opinion of the court, that *James Duffy* is not entitled to a certificate from the president of this company for the amount of his debt. While I am on the subject, I will give the opinion of the court, on the rules obtained by the company, on the state treasurer, to show cause why a *mandamus* should not issue, commanding him to pay to the company the sum of \$5000, which remains in the treasury, and is part of the money for which warrants were drawn on him by the governor. He has shown for cause, that *James Duffy* claims the said

(Commonwealth *ex relatione* Duffy v. the President and Managers of the Hanover and Carlisle Turnpike Road Company, &c.)

sum of \$4,000, to which he says he is entitled, by virtue of a contract with the company. It appears, from the return made by the president of the company, that they were indebted to *Duffy* and a certain *John Pedan* deceased, on a contract with them jointly, for work done on the road *prior to the passage of the "act for the improvement of the state,"* in the sum of \$3,000, and that the administrator of *Pedan* has given notice to the president and managers of the company not to pay the money to *Duffy*. And it also appears by the said return, that the company made another contract with *Duffy*, for work to be done towards the completion of the road, for the performance of which, *Duffy* gave security. But it is averred in the said return, that no work was done by *Duffy* in pursuance of this contract, and that at the request of *Matthew Irvine*, the agent and security of *Duffy*, that contract was rescinded. If the return made by the president, on behalf of the company be false, *Duffy* may have his action against him; but, at present, this court must hold the return for truth. Taking it for true then, *Duffy* has no right to a certificate, and it would be a breach of duty in the officers of the company to grant him one. If the company should apply the money granted by the legislature towards the expenses of *completing* the road, to the payment of an *old debt*, they would violate the law. And for debts contracted *in the completion of the road*, no *certificate* is to be given, but the president and managers may, if they please, draw *orders* on the state treasurer. If, however, the officers of the company do not choose to draw orders, but demand the money from the treasurer, themselves, it is our opinion, that the treasurer ought to pay them. This is his duty, plainly pointed out by the act of assembly, and he is not to interfere in disputes between the company, and persons with whom they may have entered into contracts for work to be done towards the completion of the road. The governor has drawn his warrant in favour of the president and managers of this company, and their receipt, will be the treasurer's voucher, for payment of the money. This is our opinion of the treasurer's duty; but at the same time, it is not thought proper to issue a *mandamus*, because we are now holding a court in the southern district, and the treasury of the commonwealth is kept in the *Lancaster* district. The practice has been, not to issue writs of *mandamus*, except from the court which sits in the district in which the persons reside, to whom the *mandamus* is to be directed.

It is the opinion of the court, therefore, that the rules, in both cases, should be discharged.

Rules discharged.

[CHAMBERSBURG, OCT. 30, 1822.]

CARL and others *against* the Commonwealth.

IN ERROR.

A declaration stating a bond executed by four, payable when three of the obligors should be required, is good.

After oyer, and pleas of performance and payment, to an administration bond, and verdict, it is too late to object a variance between the bond, and the form prescribed by the act of assembly. Nor are unsubstantial variances material at any stage of pleading.

After verdict, the want of a verification, in the assignment of breaches on a bond is cured by the *statute 4* and *5 Ann. c. 16*.

A verdict cures the omission, in such breaches, to state, that assets came to the administrator's hands.

In a suit on an administration bond, it is sufficient, after verdict, if one of the breaches is well assigned; for the penalty is then fortified.

The words "and issue" on the docket, suffice to cure any defect of form in joining issue.

Any equitable defence for the sureties in an administration bond, founded on the negligence of parties, in not citing the administrators, is proper in a *scire facias*, after judgment for the penalty, but not in a suit of the bond itself.

THIS was a writ of error to the Court of Common Pleas of *Cumberland* county, in an action of debt upon an administration bond, brought in the name of the Commonwealth against *Isaiah Carl, George Snyder, Christian Hickendom, and Samuel Ickes*. The declaration was upon a bond executed by the defendants, on the 4th *January*, 1814, in the sum of 3000 dollars, and stated, that the defendants acknowledged themselves bound in the said sum, "to be paid to the said commonwealth, when they the said *Isaiah Carl, George Snyder, Christian Hickendom*, should be thereunto afterwards required." The defendants craved oyer of the bond and condition, and they were set out. The bond was dated 4th *January*, 1814, and was in the usual form. The condition was, that *Carl and Snyder*, administrators of *John Hipple*, deceased, should file an inventory in the register's office of *Cumberland* county, at or before the 4th of *February*, 1814, and should well and truly administer, and should make an account at or before the 4th of *January*, 1815, and the conditions in all respects corresponded with the form prescribed by the act of 19th *April*, 1794, (*Purd. Dig.* 287,) except in the following particulars: instead of the words, "*within* bounden," at the commencement of the condition, it contained the words "*above* bounden:" instead of, "shall deliver and pay unto such person or persons respectively, as the said Orphan's Court, by their decree or sentence, pursuant to the true intent and meaning of *this act*, shall limit and appoint:" it was, "shall deliver and pay *over* unto such person or persons respectively, as the said Orphans' Court, by their decree or sentence pursuant to the true intent and meaning of *the several laws now in force in this commonwealth*, shall limit and appoint."

The docket entries were as follows: Defendants plead covenants

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performed, and payment with leave, &c.: and with leave to alter, or add, at any time before trial. The plaintiff replies, that defendants had not performed their covenants, and that they have not paid. Issues and rule for trial.

The following breaches were assigned on the part of the plaintiff.

1st. That *Carl* and *Snyder* had not made or caused to be made, a true and perfect inventory of all and singular the goods, &c. of the said *John Hipple*, deceased, which have come to the hands, possession or knowledge of them, the said *Carl* and *Snyder*, or into the hands or possession of any other person or persons, for them; nor did they make or cause to be made and exhibited, into the register's office in the borough of *Carlisle*, for the county of *Cumberland*, at or before the 4th day of *February*, next ensuing the date of the aforesaid writing obligatory, a true and perfect inventory of all and singular the goods and chattels, and credits of the said *John Hipple*, deceased; nor did they well and truly, and according to law, administer all the goods, &c. of the said deceased, which at the time of his death, or at any other time after his death, came to the hands or possession of them, or into the hands or possession of any other person for them.

2d. That the said *Carl* and *Snyder* did not make or cause to be made, a true and just account, calculation, and reckoning, of their administration, at or before the 4th day of *January*, in the year of our Lord, 1815, nor at any other time before, nor since that day, although to do the same, the said *Carl* and *Snyder* thereunto lawfully were required.

3d. That the said *Carl* and *Snyder* did not settle, nor present, for settlement, examination and allowance, by the Orphans' Court of the county of *Cumberland*, any administration account of any part of the goods, &c. of the said *J. Hipple*, deceased, or any rest or residue thereof, which came to their hands and possession, or into the hands or possession of any other person or persons for them; nor did they deliver, nor have they yet delivered, or pay over, any part or portion of the said goods, &c. of the said *Hipple*, deceased, to any person or persons lawfully entitled to receive the same; nor did they apply to the said Orphan's Court for their decree or sentence of distribution in that behalf, which, pursuant to the true intent and meaning of the several laws now in force in this commonwealth, the said Orphans' Court are empowered by their decree to limit and appoint.

4th. That the said *Carl* and *Snyder*, although often required, have not, nor hath either of them, performed or kept any of the conditions or covenants contained in the said writing obligatory on their part to be performed and kept, but have wholly broken the same, and refused and neglected to perform the said covenants and conditions, contrary to the form and effect of the said obligation and condition; and this the said commonwealth is ready to verify.

On the trial it appeared, that in the year 1818, both *Carl* and *Snyder* were reputed insolvents. On the 12th *December*, 1815, on

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the petition of *George Stroop*, guardian of three of the minor children of *John Hipple*, deceased, the Orphans' Court of *Cumberland* county, awarded a citation against *Isaiah Carl* and *George Snyder*, to settle their accounts at the next Orphans' Court: and on the 3d *February*, 1816, an attachment was awarded against them by the court, on motion of *Stroop*, which, however, was not to be issued, if an account were settled at the next Orphans' Court. On the 14th *May*, 1816, on motion of *Stroop*, an *alias* attachment was awarded, which was continued on the 10th of *September* following, until the next stated Orphans' Court. On the 10th *December*, 1816, *Snyder* appeared, and entered into a recognizance to the clerk of the court, himself in 2000 dollars, and a surety in 800 dollars, conditioned for his appearance at the next court, and the attachment was renewed as respected *Carl*. On the 11th *February*, 1817, *Carl* was brought into court in custody of the sheriff, on the attachment, and ordered to give security himself in 2000 dollars, and one surety in 1000 dollars, for his appearance at the next stated Orphans' Court. On the 13th *May*, 1817, this last mentioned order was continued.

The court below charged the jury in the following terms:

It is contended by the defendants, that no suit can be sustained on an administration bond, until an account be settled in the Orphans' Court. This position would lead to such unreasonable results, that we cannot believe it to be good law.

It is further contended, that as the sureties in the bond are principally interested, the proceedings in the Orphans' Court against the administrators, operate as a discharge to the sureties. We can see nothing in the evidence, which would in law have this effect. Unless something was done without the consent of the sureties, by which their rights were exposed to injury, or the relation between them and their principals was changed to their prejudice, they would not be discharged.

It is further contended, that there is no breach in the condition of the bond, because the administrators were not legally required to settle their account; that a citation and attachment are not such a "legally requiring" a settlement, as the condition of the bond requires. We differ from the opinion of the counsel for the defendants, also, in this position. Finally—If you believe the testimony, and it has not been controverted, we are clearly of opinion, your verdict should be in favour of the plaintiff. There is nothing done or omitted to be done, if the testimony be believed, which would operate as a discharge to the defendants.

The following errors were now assigned.

1. In the declaration it is not stated, that all the defendants were bound to pay, when thereunto required.

2. There are no issues on the breaches assigned, nor are there in the three first assignments any verifications or tenders of issues.

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3. The verdict is general, and, in the first breach assigned, there is no allegation, that the intestate left goods or effects, or that any goods or effects came to the hands of the administrators or any person for them.

4. The second breach is not legally assigned, inasmuch as it is not stated therein, that the administrators were legally required to exhibit and settle their administration account after the 4th *January*, 1815.

5. The third breach is illegally assigned; inasmuch as it is not stated therein, that the administrators were legally required to settle their administration account, and inasmuch, also, as the said third assignment is altogether illegal.

6. There is error in the fourth assignment of breaches, in this, that it is not stated when the demand of performance was made, and the matters therein stated do not amount to a legal assignment of breaches.

7. The court erred in charging the jury, that the proceedings in the Orphans' Court did not discharge the sureties.

8. The court also erred in their charge, in stating, that if the jury believed the testimony, there was nothing which would operate as a discharge to the defendants.

9. There is a variance in the writing obligatory of which oyer is granted, from that required by the act of assembly.

Carothers and *Mahon*, for the plaintiff in error.

Ramsey and *Chambers*, contra.

The opinion of the court was delivered by

GIBSON, J. The first exception is to the declaration, which is on an office bond given by administrators and their sureties. The *debt* is laid as being that of all the four defendants; but as being payable when three of the obligors who are named, (omitting the name of the fourth,) "should be thereunto afterwards required." I can see no error in this. A bond by four may be good, although expressly made payable when three of them should be required; and if so, a declaration setting it forth truly, would also be good.

The defendants craved oyer of the bond and condition, and had it: on which they pleaded performance of the condition and payment; and went to trial on those pleas. Their counsel now urge a variance between the condition of the bond shown, and the form prescribed by the act of assembly. Even if the objection did not come too late, the variance is so unsubstantial as to render the question altogether immaterial; and I shall therefore dismiss it without further notice.

In reply to the plea of performance of the condition, the plaintiff assigned several breaches; and these are the next subject of error.

The first objection is, that each several assignment does not conclude with a verification. After verdict, however, this defect is

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remedied by the stat. 4 and 5 *Ann*, c. 16, which restrains a party from taking advantage of it, except on special demurrer.

It is further objected to the first breach, which is laid to be an omission to exhibit an inventory in the register's office within the time prescribed by law; that there is no positive averment that the intestate left any goods and chattels which came to the hands of the administrators, or of any person for them: without which they could not be in any default. This might possibly be a valid objection on demurrer; but after verdict, the breach is well enough. It is laid to be neglect in not exhibiting an inventory of *all* the goods that came to their hands; which necessarily implies that some goods actually came to their hands; otherwise the whole would be nonsense. It is however a defect which is cured by verdict; for the plaintiff could not have recovered without proving the fact of assets.

There are errors assigned with regard to the remaining breaches, which, as the first breach is sufficient and shows a forfeiture of the bond, need not be considered; and I shall express no opinion on them further than to say, that all the breaches would probably be found good after verdict. But at all events, this suit is on an office bond given as a security for creditors and those entitled under the statute of distributions, the commonwealth being a trustee without the least imaginable interest, and bound to prosecute at the suggestion of any one who can show on a *scire facias* founded on the judgment that he has suffered particular injury; and the damages being nominal, for which no execution can issue, it is therefore immaterial whether they were assessed exclusively on good breaches, or on a mixture of good and bad. Here then there is a finding in favour of the plaintiff on all the breaches, and as there is at least one breach well assigned, that shows that the penalty was forfeited; which is the only thing to be ascertained in this action. It would be otherwise in an action whose immediate object is damages for breach of covenants; but here the judgment is for the whole penalty, the damages for injuries to particular individuals being ascertainable and to be recovered in a subsequent proceeding by *scire facias* on the judgment.

Another error assigned, is, that there was no issue joined, This is not true in point of fact. To the replication assigning the breaches, there is certainly no formal rejoinder or taking of issue; but the word "issue" is entered on the docket at the close of the short minute of the pleadings; and this we have always held to be a memorandum for the clerk to join the issue formally, the want of which, under such circumstances, is a clerical slip and amendable. To reverse for a mere formal defect of this sort, after a trial on the merits, is a grievance; and to avoid it, we say once for all, we will lay hold of the most trifling circumstance. Whether we may not even go further when we are driven to it by the absence of all pre-

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text, it is at present unnecessary to say; the docket here presents a substantial although not a formal joinder.

Beside these there are objections to the charge.

Two of the defendants, who are but sureties for the administrators, thinking they might avail themselves of negligence on the part of those who prosecute this suit in the name of the commonwealth, in not citing their principals to settle an administration account at an earlier day, and in not bringing suit in due season, prayed the direction of the court on the subject; and for a supposed mistake in that matter, error is assigned. It is clear, however, that the consequences of negligence in giving an equity to sureties, cannot be inquired into in a suit like the present, which is for the benefit of all persons concerned, whether as creditors or claimants of a distributive share; for a verdict would be conclusive on all; and negligence in particular persons should have no further effect in discharging the sureties, than as against those persons themselves. Here the commonwealth is a trustee for all parties interested, and a judgment against her would be a complete discharge of the bond, which could never be put in suit a second time. The equity of the sureties against particular persons, if any there be, (about which we intimate no opinion,) may be urged with effect when those persons come to prosecute exclusively for themselves by a *scire facias*; but not till then.

It is also assigned for error, that the decision of matters of fact, was withdrawn from the jury; but, on inspection, this is not found to be supported by the record.

Judgment affirmed.

[CHAMBERSBURG, OCT. 31, 1822.]

CHILDERSTON and another *against* HAMMON, assignee of ROSENBERGER.

IN ERROR.

Two defendants, sued jointly, may set off a debt due by the plaintiff to one of them.

On evidence of set off offered by the defendants, whether or not the debt, on which suit is brought, is equitably owned by the defendant's debtor, is a question for the jury to decide; and it is error for the court to decide it, and reject the set off.

ERROR to the Court of Common Pleas of *Franklin* county.

This was an action of debt on a single bill for 200 dollars, brought by *Martin Hammon*, assignee of *Abraham Rosenberger*, against *Richard Childerston* and *George Krouse*, in which a verdict and judgment were rendered in favour of the plaintiff in the court below.

(Childerston and another v. Hammon, assignee of Rosenberger.)

The plaintiff having proved on the trial the execution of the bill, the defendants gave evidence, to prove that *John Hammon* was really the owner of the bill, and that it was held in trust for him by *Martin Hammon* the plaintiff, and then offered evidence, that *John Hammon* was indebted to *Richard Childerston*, one of the defendants, in a sum greater than the amount of the said bill. To this evidence the plaintiff objected, and went into evidence to prove, that *John Hammon* was not the owner of the single bill; and the court, having heard the plaintiff's evidence, refused to admit the evidence offered by the defendants: whereupon the defendants tendered a bill of exceptions.

Crawford, for the plaintiffs in error, now contended, that if the evidence established a trust in *John Hammon*, for *Martin Hammon*, the defendants were entitled to set off the debt due to *Childerston*; and that whether the evidence established that fact or act, was for the jury to decide. But the court withdrew it from the jury, and decided it themselves; which was obviously an error.

Chambers, contra, contended, that two defendants sued jointly cannot set off a debt due to one of them, and cited to this purpose, 11 *Johns*. 70. (a) But if this could be done, it was necessary, in the first instance, in this case, to show, that *John Hammon* was the equitable owner, and the evidence did not establish that fact. The court were the proper judges of this preliminary fact. It resembles the case of a witness whose competency is objected to: there the court must, in the first instance, decide on that fact, and if they determine him incompetent, are bound to reject his testimony.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action of debt on a single bill for 200 dollars, brought by *Martin Hammon*, assignee of *Abraham Rosenberger*, against *Richard Childerston* and *George Krouse*. The plaintiff having proved the execution of the bill, the defendants gave evidence tending to prove, that *John Hammon* was really the owner of the said bill, which was held in trust for him by *Martin Hammon* the plaintiff, and then offered evidence that *John Hammon* was indebted to *Richard Childerston*, one of the defendants, in a sum greater than the amount of the said bill. To this evidence, the plaintiff objected, and went into evidence to prove, that *John Hammon* was not the owner of the single bill; and the court, having heard the plaintiff's evidence, refused to admit the evidence offered by the defendant. It is evident, that by this mode of proceeding, the court below drew to itself the decision of fact as well as law. The defendants had given evidence *prima facie* suf-

(a) But see *Robinson v. Beall*. 3 *Feates*, 267, *contra*.

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ficient to show, that the bill which was the cause of action, was held in trust for *John Hammon*. And if it was so held, the defendants had a right to defend themselves, by proving, that *John Hammon* was indebted to one of them, in an amount greater than the debt demanded in this suit. They should have been permitted, therefore, to go on with their evidence; after which the plaintiff might have produced what evidence he could to the contrary, and then the jury would have decided, whether the single bill was held in trust for *John Hammon*; and whether the said *John* was indebted to *Richard Childerston*, as the defendants alleged. But the court, by interrupting the defendants in the course of their evidence, and letting in the evidence of the plaintiff, which was heard by the court, and not the jury, took from the jury the trial of a material fact, *viz.* whether the bond was or was not held by the plaintiff in trust for *John Hammon*. It is not like the case of a witness objected to, on account of interest, where the court, from necessity, must hear and decide on the fact of interest. The interest of the witness is collateral to the issue which is trying. But the question whether the single bill on which this suit was brought, belonged to the plaintiff, or was held in trust for *John Hammon*, was part of the merits of the cause; because the defendants had a right to set off a debt due from him who was the equitable owner of the cause of action. The defendants might have pleaded this matter, and the plaintiffs would have been driven to take issue upon it, which would have carried the trial to the jury. And it is the same as if it had been pleaded; because the defendants, under the plea of payment, with leave, &c. which they put in, had a right, by the rules and practice of the court, to give any thing in evidence which they might have pleaded. The court, therefore, assumed the trial of the fact which belonged to the jury. The court heard the plaintiff's evidence, decided that the plaintiff was not a trustee for *John Hammon*, and for that reason only, rejected the evidence which was offered by the defendants. The defendants should have been permitted to give the evidence they offered, because it was pertinent to the issue; and by not suffering them to give it, the court diverted the trial of a material fact, from its proper tribunal. It is the opinion of this court, therefore, that the judgment should be reversed and a *venire de novo* awarded.

Judgment reversed and a *venire de novo* awarded

[CHAMBERSBURG, OCT. 31, 1822.]

Case of KEYZEY, JUN. executor of KEYZEY, SENIOR.

APPEAL.

The devisee of unpatented land belonging to the testator, has no right to call upon the personal estate of the testator to pay the purchase money and fees of patenting the land, on taking out a patent.

The owner of the land by a derivative title from the warrantee, is not personally liable for the purchase money, it is a charge upon the land.

THIS was an appeal by *John Keyzey*, junior, who was executor of the last will and testament of *John Keyzey*, senior, deceased, from a decree of the Orphans' Court of *Franklin* county, on a settlement of his administration accounts.

The testator, *John Keyzey*, senior, died seised of a tract of unpatented land, of about 200 acres, which was originally part of a larger tract of 400 acres, for which, in the year 1755, a warrant had issued to *Alexander Lowry*. *J. Keyzey*, senior, by his will, devised this tract of land to his son *J. Keyzey*, junior, after the decease of his widow, and appointed him one of his executors. In his account as executor, *J. Keyzey*, junior, charged the estate with the purchase money of this tract of land, and the fees for patenting the same, which he had paid at the land office, on taking out a patent in the year 1811, amounting to 267 dollars and 72 cents, and with interest from the time of payment. But the Orphans' Court struck these items from the account; being of opinion, that the purchase money was a charge on the land, and not a personal claim on the testator.

Dunlop and *Crawford*, for the appellant.

The purchase money due to the commonwealth was a personal debt on the part of the testator, and as such, the personal estate must first be applied in discharge of it. The warrant is a contract, implying an obligation, on the side of the warrantee, to pay the value at which the land is sold: and although there exists a lien on the land, that does not destroy the personal remedy, if the commonwealth choose to adopt it. The lien resembles a mortgage, where it is well established, that the devisee is entitled to call on the personal estate, to have the mortgage cleared off. The general rule is, that the personal estate is first to be applied for the payment of debts, unless otherwise directed by the testator. *Walker v. Jackson*, 2 *Atk.* 626. If land be sold and the vendee die, the executor must pay the vendor out of the personal assets, whatever purchase money may remain unpaid. *Coppin v. Coppin*, 2 *P. Wms.* 291. If a man devise a real estate liable to the payment of debts, giving it over to another subject to those debts, or giving what remains after payment of those debts, the personal estate shall be first applied. *Bridgeman v. Dove*, 3 *Atk.* 201. The acts of the

(Case of Keyzey, junior, excutor of Keyzey, senior.)

legislature have treated the purchase money due on the unpatented lands, as debts, for which they might call on the holder in the mode they deemed expedient. By the act of 9th *April*, 1781, the arrears were to be paid up in four annual instalments. *Sect. 6. Purd. Dig. 370.* By the act of 16th *September*, 1785, the holder might give bond for paying in five equal yearly instalments.

Chambers and *Crawford*, contra, admitted that in general the personal estate is the fund for payment of debts, though the land be liable for those debts; but they contended that this was no debt from the testator to the commonwealth. He had made no contract. The warrant contains none, and is, indeed, a mere grant, if the warrantee choose to have the land surveyed: if not, he may abandon the warrant, and avoid all liability. This is recognised by the warrant itself, which provides, that unless the terms are complied with, the grant shall be void. There is no instance of any action brought by the commonwealth, or proprietaries, for the purchase money. The warrants and locations were often in the names of persons who had no knowledge of them, and who were not to have the land. The act of 9th *April*, 1781, shows, that the commonwealth looked to the land only; for in case of non-payment, the lands were to be sold. So by the last act of *March 22d*, 1820, the deputy surveyor was to return the land, and the attorney general to institute a suit in nature of a *scire facias* on mortgage. Suppose this estate had passed through several hands, before it came to the testator, who is to pay the purchase money due on the warrant? In equity, the personal estate is not applied in exoneration of the land from a mortgage not given by the testator, because it was not a debt due by the testator. *Toll. on Ex. 419. Evelyn v. Evelyn. 2 P. Wms. 664.*

The opinion of the court was delivered by

TILGHMAN, C. J. This case comes before us on an appeal from the decree of the Orphans' Court of *Franklin* county, on the settlement of the administration account of *John Keyzey*, junior, who was executor of the last will and testament of his father, *John Keyzey*, deceased.

The matter in dispute is confined to a single item of the account, and depends on the question, whether the executor, who was the devisee of a tract of unpatented land belonging to the testator, had a right to apply the personal estate, to the payment of the sum of \$267 75, which was due to the commonwealth for the purchase money of the said land, interest thereon, and fees on patenting the same. The land was taken up by warrant granted to *Alexander Lowry*, in the year 1755. The general principle is, that the personal estate is the proper fund for the payment of the testator's debts, and shall be first applied, even to the payment of debts with which the real estate is charged. Thus, if a testator borrows

(Case of Keyzey junior, executor of Keyzey, senior.)

money and mortgages his land for it, and then dies, the heir, or devisee, may call upon the executor to exonerate the land, by an application of the personal assets to the discharge of the mortgage. But there is a distinction between debts originally contracted by the testator, and those contracted by another; for in the latter case, the land is considered as the debtor, and shall bear its own burthen. If A. purchases an estate subject to a mortgage, and dies, his personal estate shall not be applied to the exoneration of the land, unless he has done some act by which he has made the debt his own. This distinction will be found in *Toller on Executors*, 419, and in a note to the case of *Evelyn v. Evelyn*. 2 P. Wms. 664, where the cases which establish it, are collected. No doubt, the testator may order the debt to be paid out of one fund, or the other, at his pleasure; but as there is nothing in the will of *John Keyzey* which shows any decided intention on this subject, the case must be governed by the general principles of the law. It is to be considered then, what was the nature of the debt, due to the commonwealth, for the land devised to the son, and how the testator was affected by it. It was not originally contracted by him, but by *Alexander Lowry*, to whom the land was granted. Whether *Lowry* was personally liable to the late proprietaries, or whether they looked exclusively to the land, is a point on which I shall give no opinion. But I believe there is no instance in which an action was ever brought by the proprietaries, or by the commonwealth who succeeded them, for the purchase money of lands granted in the usual form. I speak of vacant lands. The case was different, where the proprietaries made sale of their manors or reserved lands, for there they might have taken notes, bonds, or some other written engagement from the purchaser. It may be considered, however, as very clear, that even supposing the original taker up of the land to have been liable to an action for the purchase money, that liability could not extend to his assignee. For, between the assignee and the proprietaries, there was no privity of contract. The commonwealth succeeded to the estate of the proprietaries; stands in their place; has the same rights, and is entitled to the same remedies. There is an immense debt due to the commonwealth, as successors of the proprietaries, for the purchase money of unpatented lands. But it seems never to have been supposed by the legislature, that the present owners of those lands were under any personal responsibility. All the acts which have been made for the purpose of enforcing payment, *have looked to the land as the debtor*. No proceedings have been directed but *in rem*. By the act of 9th April, 1781, sect. 6. (the first on this subject after the estate of the proprietaries was vested in the commonwealth,) it was enacted, that all arrears of purchase money should be paid by four equal annual instalments; and in case of default in payment of any instalment for the period of six months, the county commissioners were directed to issue their warrant to the sheriff of

(Case of Keyzey, junior, executor of Keyzey, senior.)

the county, commanding him, after due notice, *to expose the lands, or so much thereof as should be necessary to discharge the sum due, with interest and costs, to sale, &c.* By the act of 16th Sept. 1785, the owners of unpatented lands, were permitted to give bond and security for payment of the purchase money and interest, by five equal annual instalments, in the manner prescribed by that act, and in case of neglect or refusal to give such bond and security, *the lands were to be sold.* By the act of 22d March, 1820, in which a new mode of proceeding is directed, for the recovery of arrears of purchase money, *a suit is to be instituted in the nature of a scire facias on a mortgage against the owners of the lands, for the recovery of such sum as appears to be due, and the said suit is to be prosecuted to judgment and recovery in the usual manner.* It may therefore be concluded with certainty, that no action affecting *John Keyzey*, the testator, *personally*, could have been supported for the debt due on the land devised to his son, but that the debt was a charge on the land into whatever hands it might come. Neither could any action have been supported against the executor, to affect the personal assets in his hands. Those assets, therefore, were not the proper fund for paying this debt; and consequently, were not to be applied to the exoneration of the land. The Orphans' Court was of this opinion, and struck out of the executor's account, the charge which he had made against the estate, of the money paid to the commonwealth, for the purchase money and patenting fees on the land devised to him. I am of opinion, that in this, the court was right, and therefore the decree should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCT. 31, 1822.]

BRINDLE and another *against* M'ILVAINE.

IN ERROR.

If a bill of exceptions state that the court permitted evidence to be given, and then exception was taken, on error brought, it cannot be alleged that no such evidence was afterwards given. If the evidence had been withdrawn, that should be stated in the bill of exceptions.

The declarations of a vendor, after a sale, who is not a party to the suit, are not evidence, especially to contradict a written instrument.

Payments by the obligor to the obligee, without notice of any assignment of the bond, are good.

ERROR to the Court of Common Pleas of *Franklin* county, in which a verdict and judgment were rendered in favour of the defendant in error, the plaintiff below.

It was an ejectment for 25 acres of land, situate in *Franklin*

(Brindle and another v. M'Ilvaine.)

county, brought against *George Brindle* and *John Brotherton*, by *Elizabeth M'Ilvaine*, the plaintiff below, who having died after the commencement of the action, *Alexander M'Ilvaine*, her heir, and devisee, was substituted in her place, according to the act of assembly in such case provided. A decision took place in this cause, upon a former writ of error, which is reported, 7 *Serg. & Rawle*, 345, where the title of the parties is stated.

On the present trial, in the court below, a bill of exceptions was signed by the judges, which stated, that "the plaintiff, further to support the said issue, and to prove the same on his part, proposed, and offered to prove, the declarations of *Robert Hazlet*, in the year 1809, while the occupancy of the land in dispute, relative to the character in which he held and occupied the same, and in relation to the sale to *Brotherton*. To which testimony so offered by the plaintiff the defendants by their counsel objected, and the court, upon argument overruled the objection, and permitted the evidence to be given. Whereupon the defendants excepted to the opinion of the court, and prayed them to seal this bill of exceptions, which is accordingly done." A witness was then examined on behalf of the plaintiff, but he was not able to state any of *Hazlet's* declarations on the subjects mentioned in the bill of exceptions.

The plaintiff further offered evidence of the payment of money to *Robert Hazlet* by *Elizabeth M'Ilvaine*, in the year 1811, and at other times prior to the commencement of this suit. The defendants objected to this evidence, but the court admitted it, and sealed a second bill of exceptions.

The defendants proposed several points to the court, on which they requested them to charge, and the answers to them were now assigned for error. But one, however, was noticed in the argument, namely: "Unless there is full and satisfactory evidence that the full amount of the bond of *Elizabeth M'Ilvaine* to *Hazlet*, was paid to *Hazlet*, prior to the sale made by him to *Brotherton*, or that which was then due has been since paid to *Brotherton*, the plaintiff cannot recover." This point was answered by the court in the negative.

S. Riddle and *Hughes*, for the plaintiff in error.

1st Bill of Exceptions. The declarations of *Hazlet* were not evidence to explain his sale to *Brotherton*. He was not a party to the suit, and his sale was by written articles of agreement, on which part of the purchase money had been paid. The lease to him was also in writing, and was the only proper evidence of the character in which he occupied the land. It could not be contradicted or varied by parol proof.

2d Bill of Exceptions. The evidence of payments by *E. M'Ilvaine* to *Hazlet* was improperly received. These payments were made to him by her in her own wrong. After his disposition of the land, he was not authorised to receive the balance due.

(Brindle and another v. M'Ilvaine.)

Answer of the Court.—After the sale, the payments should have been made to *Brotherton*. His title was valid, although the consideration was part in money and part in land. *E. M'Ilvaine* had no equity against him until payment of her bond.

Chambers, Jr. and Chambers, contra.

1st Bill of Exceptions. The former opinion of this court determined, that the sale by *Hazlet* to *Brotherton* was not in pursuance of the power. No estate therefore passed by the sale. But, in fact, the defendants were not injured by the decision of the court below, for though the plaintiff was allowed to give the evidence of *Hazlet's* declarations, no such evidence was given. The witness who was expected to prove it, had no knowledge on the subject.

2d Bill of Exceptions. The payments by *E. M'Ilvaine* to *Hazlet* were made in the regular discharge of her contract: the bond was payable to him, and she had no notice of any transfer of the right in the bond or the land.

Answer of the Court.—This is the same point as the forgoing. If the payments to *Hazlet* were regular, *E. M'Ilvaine* was not bound to pay *Brotherton*.

The opinion of the court was delivered by

TILGHMAN, C. J. This ejectment was brought by *Elizabeth M'Ilvaine*, upon whose death, *Alexander M'Ilvaine*, her heir, was made plaintiff, according to the act of assembly in such case provided. It is the second time it has been brought before this court by writ of error, and having fully stated the material facts in my former opinion, I shall refer to that statement without repeating it now. On the last trial in the court below, the counsel for the defendant took two bills of exceptions to evidence, and several exceptions to the charge of the court. The 1st bill is as follows: "The plaintiff proposed and offered to prove, the declarations of *Robert Hazlet*, in the year 1809, while in the occupancy of the land in dispute, relative to the character in which he held and occupied the same, and in relation to the sale to *Brotherton*, to which testimony so offered by the plaintiff, the defendants by their counsel objected, and the court, upon argument, overruled the objection, and permitted the evidence to be given, whereupon the defendants excepted to the opinion of the court," &c. The plaintiff's counsel have attempted to destroy this bill of exceptions, by alleging, that after the court had decided, that the evidence might be given, the plaintiff's witness was not able to give any testimony respecting *Hazlet's* declarations, and therefore the defendants were not injured by the opinion of the court to which they excepted. But this is an allegation which cannot be permitted, because it is in direct contradiction to the bill which is part of the record, and in which it is averred, that the evidence was permitted to be given.

(Brindle and another v. M'Ilvaine.)

After the court had decided that the evidence was admissible, it was in the power of the plaintiff to withdraw it, in which case it should have been inserted in the record that it was withdrawn, but as this record stands, it must be taken for granted that it was given. Were the declarations of *Hazlet* evidence then or not? In the first place, they were offered to show the character in which he occupied the land in dispute. But that character had been fixed, by a written lease which he had accepted from *Brotherton*, and which could not be contradicted by any declarations of his—and in the next place, his declarations were offered, respecting a previous sale which he had made to *Brotherton*, by written articles of agreement. *Hazlet* was no party to the suit, and therefore his declarations, subsequent to the sale, were not evidence against *Brotherton*. But there was a particular impropriety in hearing parol declarations, touching a written contract. I am of opinion, therefore, that the evidence ought not to have been received.

The second exception was, to the admission of evidence offered by the plaintiff “to prove the payment of money to *Robert Hazlet*, by *Elizabeth M'Ilvaine*, in the year 1811, and at other times prior to the commencement of this suit.” Mrs. *M'Ilvaine* had given her bond to *Hazlet*, on the 24th March, 1808, for £325, (the purchase money of the land in dispute) payable on the 25th March, 1808; why then should the plaintiff not give evidence of payment at any given time. Because, says the defendant, *Hazlet*, before the year 1811, had sold the land to *Brotherton*, and if Mrs. *M'Ilvaine* considered that sale as void, and insisted on keeping the land herself, she ought to have paid the balance of the purchase money to *Brotherton*, and not to *Hazlet*. How the matter would have stood, if *Brotherton* had given her notice that her bond was assigned to him, and warned her not to make payment to *Hazlet*, is another question. It does not appear, that she received any such notice, and on that state of the case, it is extremely clear that she had a right to make payment to *Hazlet*; nay, that she could not safely have paid her money to any body else. Because, even if she knew that *Hazlet* had sold to *Brotherton*, it did not follow that he had assigned her bond to him. And it was decided by this court, in the case of *Bury v. Hartman* (4 Serg. and Rawle, 175) that payment to the obligee, after assignment, and before notice, is good against the assignee. I am of opinion, therefore, that the evidence was properly admitted.

The defendant's counsel took exceptions to several answers of the court below, to questions proposed for their opinion; but as they have only argued one of them, I shall not take notice of any other. That question (the 6th) is in the following terms. “Unless there was full and satisfactory evidence, that the full amount of the bond of *Elizabeth M'Ilvaine* to *Hazlet*, was paid to *Hazlet*, prior to the sale made by him to *Brotherton*, or, that whatever was then due, has been since paid to *John Brotherton*, the plain-

(Brindle and another v. McIlvaine.)

tiff in this case cannot recover." The court negatived the defendant's proposition, and very rightly, for reasons which I have already given in my remarks on the 2d bill of exceptions. In the case here put by the defendant's counsel, there is no mention of notice to *Elizabeth McIlvaine*, of the assignment of her bond, and under these circumstances, her payment of the whole money to *Hazlet*, and nothing to *Brotherton*, would be no impediment to the plaintiff's recovery. I am of opinion, on the whole, that judgment should be reversed and a *venire de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

[CHAMBERSBURG, OCTOBER, 1822.]

CROTZER and another *against* RUSSELL, executor of LYON.

IN ERROR.

Where the writ states the plaintiff to be executor of A. who was a surviving obligee with B. it is no variance, though the statement describe the bond as given to A. and B. executors of C. and the bond is in that form.

A deed for land accepted by the vendee after articles of agreement, though it differ in some respects from the articles, is to be considered as expressing the ultimate intent of the parties, where there is no misconception of the deed by either party.

ERROR to the Court of Common Pleas of *Cumberland* county.

Debt on bond. The *præcipe* and writ were in the name of *James M. Russell*, executor of *John Lyon*, who was surviving obligee in a bond with *William Alexander*, deceased, as plaintiff, against *Christian Crotzer* and *Christian Ruhl*, defendants. The plaintiff afterwards filed a statement describing the bond as having been given by the defendants to *John Lyon* and *William Alexander*, executors of *Samuel Lyon*, deceased, and the action was afterwards so entitled on the docket at the plaintiff's instance. The defendants pleaded payment with leave to give the special matters in evidence: to which the plaintiff replied *non solverunt*, and issue was joined.

The bond being offered in evidence by the plaintiff on the trial, and agreeing with the statement, the defendant objected to its being read in evidence, because it differed from the writ. But the court overruled the objection, and admitted the bond, and a bill of exceptions was taken by the defendants.

The defence set up was, that the bond given by the defendants was in part payment of a tract of land conveyed to them by *John Lyon* and *William Alexander*, executors of *S. Lyon*, in pursuance of articles of agreement that had been made between the parties: and that in the conveyance, a small parcel of land, and water right, included within the lines of the tract, were excepted, though they were embraced by the articles, and the exception was not explained

(Crotzer and others v. Russel, executor of Lyon.)

to the defendants, nor understood by them, when they accepted the deed, and gave their bonds.

The court charged the jury very fully, and, among other things, stated, that "articles of agreement are in their nature and terms executory, and express the agreement of the parties, that they shall be consummated afterwards by the execution of a deed. In making and executing the deed, the parties have a right to alter their original agreement, and, if a difference afterwards appear, between the terms of the articles of agreement and deed of conveyance, in the absence of other proof, the law considers the articles of agreement to be null and void." They further charged (after some preliminary remarks,) in the words if the 3d point proposed to them by the defendants, "that if the jury believed, that the reservation of the small parcel of land and water right were not read and fully communicated to the defendants, or they did not understand the nature of the reservation, then the jury might make such deduction from the bond, as would compensate them for the loss of the land so reserved."

The 4th point proposed to the court by the defendants was, that as there is no court of equity in this state, to give redress to the defendants in cases of concealment, misconception of their rights, or fraud, the jury have full power under the equitable circumstances of the case, and under the pleadings, to make an allowance to the defendants even to the amount of the debt and interest, and from a consideration of such circumstances might return a general verdict for the defendants.

The court charged that "the jury have such equitable powers, if the law and the facts of the case authorise them to exercise it."

The jury found a verdict for the plaintiff, for the sum of 2429 dollars 68 cents, and judgment was rendered accordingly.

Errors were now assigned, and in support of them *Ramsey* and *Douglass*, argued for the plaintiffs in error.

Lyon and *Mahon*, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This action was brought, in the name of *James M. Russell*, executor of *John Lyon*, who was surviving obligee in a bond with *William Alexander*, deceased. The plaintiff did not file a declaration, but a *statement* under an act of assembly, in which the bond is described as having been given by the defendants to *John Lyon* and *William Alexander*, executors of *Samuel Lyon*, deceased. On the trial of the cause, the plaintiff produced the bond, which agrees exactly with the statement, but the defendants objected to it, because it varied from the writ. The evidence was admitted, and the court's opinion excepted to. This is the 1st error assigned. The bond was good evidence. It agreed with the statement and did not vary from the writ. It was not necessary

(Crotzer and another v. Russel, executor of Lyon.)

to state in the writ, that the obligees were described as executors of *Samuel Lyon*. The action was not brought by the plaintiff as executor of *Samuel Lyon*, but of *John Lyon*. The fact was, that *John Lyon* and *William Alexander*, executors of *Samuel Lyon*, sold to the defendants land which belonged to the estate of *Samuel Lyon*, and took bonds for the purchase money to themselves, describing themselves as executors of *Samuel Lyon*. But this description was an immaterial circumstance, not necessary to be noticed in the writ, because this action was not brought by the plaintiff as representing the estate of *Samuel Lyon*, but as executor of *John Lyon*. There was no error therefore in the admission of the bond as evidence.

The defendants excepted also to the charge of the court, and to the answer given by the court to one of the points on which their opinion was required. The defendants gave evidence, that they had entered into written articles of agreement with *John Lyon* and *William Alexander*, for the purchase of a tract of land, after which a conveyance was executed, and the defendants gave their bonds for the purchase money. In the conveyance, there was an exception of a small parcel of land, included within the lines, and the defendants insisted, that they had been deceived as to this exception, which was not explained to them when they accepted the deeds and gave their bonds. The court charged the jury, "that if they should be of opinion that the deed was not read and fully communicated to the defendants, or they did not understand the nature of the exception of the small parcel of land, then the jury might make such deduction from the defendants' bond, as would compensate them for the loss of the land so excepted." This surely was as much as the defendants could ask, and all they did ask, but they complain, that the court said, that "where the articles of agreement and deed of conveyance differed, the articles were considered as null and void." What the court meant was this, that when articles of agreement are entered into, by which a conveyance of land is covenanted to be made, and afterwards a conveyance is executed, and accepted, which differs in some respects from the articles, the deed of conveyance, which is the consummation of the agreement, shall be taken for the ultimate intent of the parties, and prevail over the articles, and this is undoubtedly true, where there is no misconception or misapprehension of the deed of conveyance by either party. If the defendants were fully informed, that the deed which they accepted, contained a reservation of a parcel of land contained in the articles of agreement, and having accepted the conveyance, gave their bonds for the whole purchase money, neither in law or equity would they be entitled to any abatement. But, if they accepted the deed, under a misapprehension, occasioned by the fault of the plaintiff, however the strict law might be, they would be entitled to relief in equity; so the court told the jury, and what more could the defendants desire? The charge was so plain that it was im-

(Crotzer and another v. Russell, executor of Lyon.)

possible the jury could mistake it. And whether the jury considered the articles as null and void, or not, was of no manner of importance, provided they were to make the defendants all the allowance which the equity of their case demanded, in consequence of any mistake as to the nature of the deed of conveyance. This they were expressly instructed to do, and therefore I am opinion there was no error in the charge.

I will now consider the answer of the court to the 4th point proposed by the defendants' counsel. The proposition was this—that by the law of *Pennsylvania*, the jury, under the direction of the court, might take the equity of the defendants' case into consideration, and make such deduction from their bond as in equity they were entitled to. The court answered in the following words:—"The jury have such equitable power, if the law, and the equity of the case authorize them to exercise it." The defendants complain that from the obscurity of this answer, the jury were left in the dark, as to their duty in the particular case before them. There might be something in this objection, if the court had not fully explained the principle, of law and equity by which the jury were to be governed in their charge. But having explained it very clearly, and very favourably to the defendants, it cannot be said that the jury were left in the dark. The answer of the court to the 4th proposition informed the jury of their general powers, and the charge instructed them in the law as applicable to the evidence before them. I am of opinion, on the whole, that there is no error in any part of this record, and therefore the judgment should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCT. 1822.]

CROTZER and another *against* RUSSELL, executor of LYON.

IN ERROR.

Where the defendant, in a suit on a bond for part of the purchase money of land, sets up a defect of title and misrepresentation as a defence, a recovery in a former suit on another bond for part of the purchase money, on which it is alleged the same defence was made, is no reason why the court should reject the evidence of the defendant: whether the same matters had been tried in the former action is for the jury.

ERROR to the Court of Common Pleas of *Cumberland* county.

This was another action of debt, brought by the same persons who were plaintiffs in the foregoing suit, against the same defendants, upon another bond for the purchase money, and a verdict and judgment were rendered for the plaintiffs below.

On the trial of this suit, which took place after the verdict was rendered in the foregoing case, the defendants offered to prove, that

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the bond on which this suit was brought was given for the purchase money of a tract of land ; that the deed of conveyance reserved a nook of land, which the defendants supposed to be included in their purchase, and which had been represented to them as included therein by *John Lyon* and *William Lyon*, from whom they made the purchase, and that they were ignorant of the reservation contained in the said deed. The plaintiffs objected to this evidence ; and, to support their objection, read the record of the suit previously tried, and gave in evidence, that the previous suit was on a bond given for part of the same purchase money, for the same tract of land, and that on the trial thereof, the defendants set up the defence now offered. The court, thereupon, overruled the evidence, and the defendants tendered a bill of exceptions.

Douglass, for the plaintiff, in error, stated the errors assigned, and was proceeding to argue them ; but on an intimation from the court that there was clearly error in this case, because the court below took on itself the right of deciding, whether a certain point had been tried and decided by a former jury, in a trial on another bond, between the same parties, which ought to have been left to this jury, the argument proceeded no further.

Douglass and *Ramsey*, for the plaintiffs in error.

Lyon and *Mahon*, contra.

PER CURIAM. The defendants below, offered to prove, that the bond on which this suit was brought, was given for the purchase money of a tract of land : that in the deed of conveyance, there was a reservation of a nook of land, which the defendants supposed to be included in their purchase, and which had been represented to them as included therein, by *John Lyon* and *William Alexander*, from whom they made the purchase, and that they were ignorant of the reservation contained in the deed of conveyance. To this evidence the plaintiffs objected, and in order to prove that it was improper, they gave evidence to show, that the defendants had set up the same defence in another action brought against them by the plaintiffs on another bond given by the defendants to the said *Alexander* and *Lyon*, in part of the purchase money for the same tract of land, and that the jury had found a verdict against the defendants. The court, having heard this evidence, rejected the evidence offered by the defendants. It is very clear, that the evidence offered by the defendants was *prima facie* a good defence, and must have been so considered by the court below, if they had not heard other evidence, from which they concluded, that the evidence offered by the defendants was improper. But in order to arrive at this conclusion, the court took upon itself to decide on the truth of the matter alleged by the plaintiffs, *viz.* that the defence set up by the defendants had been tried and decided against them before. But this should have been left to the jury, and by this mode of proceeding, the court took the whole trial into its own hands. The defend-

(Crotzer and another v. Russell, executor of Lyon.)

ants should have been permitted to go on with the evidence, and then the plaintiffs might have shown what they could to take off the force of it. But whether any matter had been tried between the same parties, and decided before, was a fact, depending in part on parol evidence, and therefore to be decided by the jury, and not by the court. We have had occasion to consider points of this kind in several instances very lately, and have reversed the judgments, because the court below had stopt one party in the course of his evidence, and heard the evidence of the other party, after which they rejected the evidence first offered. It appears to us, that if this practice is pursued, the trial of facts will be transferred from the jury to the court. We are therefore of opinion, that this judgment should be reversed and a *venire de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

END OF OCTOBER TERM, CHAMBERSBURG, 1822.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1822.

[PHILADELPHIA, DEC. 19, 1822.]

SHAFFER *against* BROBST.

IN ERROR.

When it appears by the record, that after the return of summons a rule was entered to declare, and after declaring, the plaintiff entered a rule to plead, and signed judgment for want of a plea, the judgment is regular.

The court will not presume a rule to have been entered by the prothonotary of his own mere motion.

If such were the case, the remedy is by application to the court below, and not by writ of error.

ERROR to the Court of Common Pleas of *Lehigh* county.

Case, by *Christian Brobst*, the plaintiff below, against *William Shaffer*, the defendant below, in which a summons issued to *January* term, 1820, and the sheriff returned "summoned." It appeared by the record, that on the 6th *September*, 1820, a rule was entered to declare by the 1st day of next term, or *non pros*. On the 21st of the same month, a declaration was filed, containing a single count for money had and received, and on the 6th *December*, 1820, a rule was entered to plead in six weeks, or judgment. *January* 22d, 1821, judgment was entered according to the rule. A *fieri facias* was issued returnable to *January* term, 1821, which was returned *nulla bona*, and a *testatum fi. fa.* was then issued to *Northampton* county, returnable to *April* term, 1821, on which a levy was made on personal property. On the 30th *April*, 1821, *H. Ross* appeared for the defendant, and a motion was made, founded on an affidavit of defence, and that the defendant had no know-

(Shaffer v. Brobst.)

lege of the suit, to open the judgment and let the defendant into a defence, which the court below rejected.

Scott, for the plaintiff in error, contended, that the judgment was erroneous, because it was entered without the defendant's appearance. The defendant never appeared till fifteen months after suit brought, and after his goods had been levied on. It is true, there is a rule to declare entered, but the record does not show by whom: it may have been done by the prothonotary, without authority. The rule to plead is, therefore, irregular, and will not warrant this judgment. The judgment is equally irregular, if considered as a judgment by default for want of appearance. The act of assembly of the 20th March, 1724--5, regulating the practice on writs of summons and arrest, sect. 1. *Purd. Dig.* 22, provides for entering judgment by default after filing a common appearance, where the officer certifies to the court upon oath or affirmation, that on or before the return of such writ, he had summoned the defendant, mentioning the day he did so; and requires, that the summons shall have been served ten days before the return day, and that the declaration shall have been filed five days before the return day. None of these requisites appear on this record. The return is generally, "summoned," without any specific oath as to the day, and the declaration was filed long after the return day. In *Fitzsimmons v. Solomons*, 2 Binn. 436. the judgment below was reversed in the court, because it appeared from the *præcipe*, that only five days intervened between the issuing and return of the summons.

Binney, for the defendant in error, argued, that sufficient appeared on the record to support the judgment. As to the practice in proceedings by summons, the act of 1724--5, has received a construction from long usage, that where the record shows that the party was summoned, the court will presume, to support the judgment, that this summons was served in proptime, unless the contrary appears by the record. It has not been customary for the sheriff to make a special oath in each case. But independently of this, the record sufficiently shows an appearance. A rule to declare was taken: this must have been taken by the defendant in person, or by attorney: for he has a right to appear in person. The plaintiff having declared, a rule was taken to plead, and it must be presumed it was made known to the defendant or his attorney.

PER CURIAM. The error assigned in this case, is, that a rule to plead was laid on the defendant, and judgment entered against him by default, before he had appeared. Had the case been so, it would have been error. But it appears by the record, that the plaintiff had been laid under a rule to declare, previous to his taking a rule to plead against the defendant. Now this rule to declare, must have been obtained by the defendant or his attorney; for we cannot hearken to the suggestion, of its being laid by the court *of its own mere motion*. If the prothonotary had entered this rule

(Shaffer v. Brobst.)

by mistake, the remedy would have been by motion to the court below, who would have ordered it to be struck out. As the record stands, it appears to us, that the rule to plead was regularly entered, and therefore the judgment should be affirmed.

Judgment affirmed.

[PHILADELPHIA, D. C. 22, 1822.]

THOMAS *against* WRIGHT.

IN ERROR.

The sheriff's docket is not evidence to show the time when an inquisition was held on a *fi. fa.* where there is a blank left in the inquisition.

But the time may be shown by parol evidence.

The day on which an inquisition was taken is not a matter of record, but a matter in *pais*.

A mere return to a *liberari* by the sheriff, that he had delivered possession to the plaintiff in that suit, does not vest the title in such plaintiff; it is only an authority to enter; and he must bring an ejectment, or obtain the actual possession, before it can be considered, in an ejectment between others, as a subsisting title in him.

Where the defendant in ejectment has only an equitable title to hold real estate till certain moneys are reimbursed, the plaintiff is entitled to recover, if such moneys are reimbursed at the time of trial: but if the defendant has a legal title of that description, the plaintiff cannot recover, unless the moneys were reimbursed at the institution of the ejectment.

A contract that a person shall occupy a house, and put it in repair, and in consideration thereof shall enjoy the property at a certain rent, till the repairs be reimbursed, makes such person a tenant from year to year, and not liable to ejectment when the contract is ended, without notice to quit.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in an ejectment brought by *William Wright*, the plaintiff below, against *John Thomas*, for a house and lot in the county of *Philadelphia*, in which a verdict and judgment were rendered for the plaintiff. Two bills of exceptions were taken by the defendant to the admission of evidence, and a third to the charge of the court.

The property in question belonged to the plaintiff's father, *George Wright*, who, in the year, 1801, conveyed it to a certain *John Thomas*, (not the defendant,) in trust, to pay over the rents and profits to the said *George* and his wife *Alice*, during their lives, and afterwards to the plaintiff in fee. *George Wright* died, and after him *Alice*; and the plaintiff, (who was an infant at the time of the conveyance,) remained absent till the year 18'7. In the meanwhile the property had gone out of repair, and had been also subject originally to a ground rent. By an arrangement made between *Thomas* the trustee, Mr. *Odenheimer*, the ground landlord, and *Rose Thomas*, under whom the defendant claimed, it was agreed, that *Rose Thomas* should put the house in repair, and, in consideration thereof, should enjoy the property at a rent of 60 dollars, until she

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was reimbursed the money she expended. A considerable sum was expended by *Rose Thomas* in repairs, and one question of fact was, whether she had enjoyed the property long enough to reimburse herself. In the summer of the year 1817, the plaintiff *William Wright*, returned to *Philadelphia*, and claimed the property: but evidence was given by the defendant, that at a meeting at Mr. *Bradford's* office about that time, at which the plaintiff, *Rose Thomas*, *Thomas* the trustee, and Mr. *Odenheimer*, the ground landlord, were present, the above mentioned arrangement was assented to by the plaintiff, and a balance admitted still to be due to *Rose Thomas*, on account of moneys expended in repairs. In *October*, 1817, the plaintiff being indebted to *Jacob Mooney*, gave him a bond and warrant of attorney, upon which, in *December*, 1817, judgment was entered up, and execution issued and levied on the property, and an inquisition was afterwards held in *March*, 1818, as the defendant alleged. This inquisition having found that the rents and profits would pay the debt in seven years, a *liberari facias* was taken out.

On the trial, the defendant contended that the moneys expended for repairs were not reimbursed at the time of trial; but that at all events they were not reimbursed when the ejectment was brought, and, therefore, the plaintiff could not recover in this ejectment. He also contended, that there was an outstanding title in *Jacob Mooney*, under the *liberari facias*, and produced the *liberari facias*, and inquisition, after having proved the judgment above mentioned, and *fieri facias*. The *liberari facias* was tested the 5th *March*, 1818, and the sheriff's return was indorsed, that he had delivered possession on the 18th *June*, 1818. The inquisition purported to have been taken on the — day of *March*, eighteen hundred—. The defendant then offered the docket of *Thomas Truxtun*, sheriff, of *June* term, 1818, to show, that the inquisition annexed to the writ of *liberari facias* was held and taken by the said sheriff and jury, in *March*, 1818. The plaintiff objected to this evidence, and the court overruled it, which was the subject of the first bill of exceptions.

The defendant then offered parol evidence to prove, that the inquisition was, in fact, held and taken by the said sheriff and jury, in *March*, 1818. This evidence was also objected to by the plaintiff, and overruled by the court, and a second bill of exceptions was taken by the defendant.

The third bill of exceptions was to the following charge of the court.

The plaintiff has showed a good and sufficient title. The deed of trust vested the property in the plaintiff, immediately on the death of *Alice Wright*, and no conveyance was necessary to be made by the trustee, to the plaintiff, after the death of *Alice*. The defendant has contended, that the plaintiff must have a right to

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possession of the premises at the time of the action brought, and that if the right of possession was not in the defendant, it was in *Jacob Mooney*, a creditor of the plaintiff, who had sued out the writ of *liberari facias*, by virtue of which possession of the premises had been delivered to him. We think that *Mooney's* possession under the *liberari facias* was no more than legal possession, and if the proceeding on the *liberari facias* had been fair and regular, *Mooney* might have brought an ejectment for the premises. In such suit, he must have shown the proceedings to be regular; but on the face of the inquisition they are not fair and regular—there is a blank in the inquisition which cannot be supplied by parol proof. Had application been made to the court within a short time after the return of the inquisition, it might, perhaps, have been amended; but that would have been discretionary with the court, under all the circumstances. The defendant has no right to set up a title in a third person, unless it be a good and subsisting title at the time. *Mooney* may have abandoned his title, or may have been paid. The defendant must show that *Mooney's* title still subsists, and as *Mooney* does not set up his title, we cannot presume it. But it was contended, that the jury may infer the time when the inquisition was executed from the *liberari*, inquisition, sheriff's return, and record of the District Court. We do not think so; the jury have no such right, it would be giving them power to amend. We put therefore entirely out of the question the title of *Mooney*, and the jury are not to take it into consideration. But admitting the proceedings were regular and a legal possession in *Mooney*, the defendant stands in the light of a tenant of the plaintiff, and as the tenant of the plaintiff the law is, that he cannot set up even a good outstanding term against his landlord. But it is further contended by the defendants, that under this arrangement made by *Thomas*, the trustee, with Mr. *Odenheimer*, the defendant had a right to retain possession of the premises, until reimbursed the amount of monies expended by him for repairs, taxes, and ground rent. The plaintiff contends, that *Thomas*, the trustee, had no right to make such an arrangement; strictly, perhaps, he could not as trustee. But after the trust had expired, *Thomas* acted as the agent of the plaintiff, who sanctioned his authority. We think the arrangement made with Mr. *Odenheimer* binding on the plaintiff. Under that arrangement, as to the repairs, and the amount of them, and whether they were tenantable repairs, these are questions for the jury. The defendant must be reimbursed; but the question is, whether it is sufficient if it is found that he is now reimbursed, or whether the plaintiff had a right to bring his action, unless the defendant had been reimbursed at the time the action was brought. The defendant contends that the plaintiff cannot recover, unless the defendant was reimbursed at the time the action was brought, or unless the plaintiff had offered to reimburse him before the suit was brought. The plaintiff contends that the defendant was reimbursed

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before the suit was brought, but says it is sufficient, if it appear that the defendant was reimbursed at the time of the trial. The defendant contends that he was not reimbursed before the suit was brought. The law appears to be well settled as contended for by the plaintiff, and that it is so, appears by the cases of *Wharf v. Howell*, 5 Binn. 499. and 4 Binn. 31. If the defendant be paid at the time of the trial it is sufficient. The defendant admits that he is now paid, and offers to deliver up the possession. It is said, that it is a simple question of costs. By whose faults have the costs occurred? The costs are the consequence of the defendant's persevering to hold the possession, and not rendering an account to the plaintiff, and attempting to show that the expenditures have not been satisfied out of the rents. The defendant has only an equity, the legal title is in the plaintiff. When the plaintiff claimed possession, the defendant should have offered to give up the property, and shown his account of expenditures. It was not incumbent on the plaintiff before action brought, to make tender of payment or claim any account. Why should the plaintiff make a tender, when the defendant offered no account at Mr. *Bradford's* office. Before the suit brought there were no vouchers produced, nor was the account settled. Mr. *Bradford* stated that he acted as the attorney of the defendant, and, of course, made out the account as favourably as he could for the defendant. That account can have no operation in this case, the only question is, is the defendant now paid? If he is, the plaintiff is entitled to recover, and the costs will necessarily follow the verdict.

The bill of exceptions contained no statement of the testimony previously given on the trial, but referred to it as contained in the notes of the four counsel employed in the cause, and in the notes of the judges who tried it.

J. S. Smith and *Ewing*, for the plaintiff in error, cited *Brown v. Vandusen*, 10 Johns. 51. *McCormick v. Meason*, 1 Serg. & Rawle, 92. *Morehead's lessee v. Pearce*, 2 Yeates, 456. *Lynn v. Risberg*, 2 Dall. 180. *Mageehan v. Adams's lessee* 2 Binn. 109. 2 Yeates, 150.

Keerle and *Newcomb*, contra, cited act of 1705, 1 Sm. Laws. 63. *Moody v. Vandyke's lessee*, 4 Binn. 31. *Wharf v. Howell*, 5 Binn. 499.^a

The opinion of the court was delivered by

DUNCAN, J. The reference in the bill of exceptions to the notes of the four counsel concerned for the parties, and the notes of the evidence of the judges before whom the cause was tried, does not answer the design of a bill of exceptions, which is, to desire the opinion of the court on certain points of law propounded to them on some given state of evidence. To refer then to the notes of six

^a The case was but partially argued, owing to an expectation of a compromise.

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gentlemen, however accurate and correct they may be in noting the evidence, cannot be said to afford a precise statement of facts. The notes will not always agree, nor is it to be expected that they should. If they disagree, what is the reviewing court to do? They cannot decide upon their relative accuracy and exactness. Besides, it is imposing on the court above a task which their duty does not require of them, of wading through volumes of notes, where only a small portion of them relates to the particular point, in which the opinion of the court is required. This, besides consuming time unnecessarily, creates confusion, and incertitude as to the facts; for the bill does not draw the whole matter into examination, but only the point on which it is taken. So much difficulty may not arise in the present case, in relation to which, I do not particularly make the observation, but with reference to a practice which ought not to be countenanced. It saves a little labour at the moment, but finally wastes much time. There is no doubt from the whole record, but that the plaintiff below, defendant in error, is the owner of the property in question: that is, he has the title to it; for *cestui que* trust can in this state sustain ejectment in his own name. But one man may have the right of possession, and the other the right of property, and the right of possession is the sole inquiry in ejectment. The defence set up by the plaintiff in error, defendant below, was, that the property was levied on by the sheriff, as the estate of the defendant in error, at the suit of *Jacob Mooney*; that an inquisition was held, that it would pay the debt and damages within seven years, as was found by the inquisition; that a *liberari facias* issued, on which it was returned, executed, and possession delivered to the plaintiff in the judgment. The plaintiff in error offered to prove this by the record and return of the sheriff, (the inquisition annexed to the *liberari facias* being in blank as to the day and year in which it was taken by the sheriff and jury, viz. on the — day of *March*, one thousand eight hundred —.) This was objected to, and the plaintiff offered the sheriff's docket to prove that it was executed — *March*, 1818. This evidence was overruled, and I cannot say there was error in this. It was the mere private book of the sheriff; the transaction was a recent one, and there had been no actual correspondent possession. But the defendant below further offered to prove by the witnesses, that the judgment was executed on the — day of *March*, 1818, and this was likewise refused. This evidence was competent. It was impossible that the inquisition could have been taken in *March*, 1800: there had been then no judgment; the teste of the *liberari facias* was 1818. *Thomas Truxton* was not the sheriff in 1800. This inquest was not a judicial act and record of the court. The sheriff was out of office—was dead—there could be no order to amend or amendment made. The day on which it was taken was not a matter of absolute verity as a record of the court, but a matter merely *in pais*. If it had even stated a precise date, the mistake could be put right, and parol evi-

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dence admitted to show when it was really done. Indeed it required no explanation. The *evidentia rei* was sufficient to show the real year—that it was 1818, and not 1800. But to remove all doubt, it was competent to the plaintiff to show, by the jurors or others, the year in which it was executed. This however would have gone but a little way, it would not have placed either title or possession in *Mooney*; for the return of the sheriff, as the court very properly instructed the jury, did not prove an actual, but a virtual delivering of possession. On the execution of the *liberari facias*, the sheriff is to deliver to the creditor the premises, in the same manner as lands are delivered on writs of *ejectment* in England. But this delivering is no more than an authority to enter, and the creditor must bring an ejectment, 4 *Mod.* 48. 1 *Crompt. Pr.* 363. *Addison*, 103. *State v. Kirkpatrick and another*. By act of 13th April, 1807, *Purd. Dig.* 262, on the execution of a *liberari facias*, where the defendant, or his tenant is in possession, the sheriff shall deliver the actual possession thereof to the plaintiff, or his agent. When the *liberari facias* was executed, the defendant in error was not in possession, nor the plaintiff in error considered as tenant: it is however certain that neither was dispossessed. It is not pretended that any possession was really delivered to *Mooney*, or any further prosecution of his judgment and execution, nor was there any connection then or now between *Mooney* and the plaintiff in error, or any claim set up by *Mooney*. And though it be true, that the tenant in possession may set up an outstanding title in a stranger, yet it must be a subsisting one. The title could not be said to be in *Mooney*. He has not taken the possession, nor has he made any entry. The proceeding is altogether inchoate: it cannot be compared to a sale by the sheriff, and deed executed and acknowledged, for that vests the absolute title in the purchaser. There is no error in this instruction to the jury: it was not a bar to the plaintiff's recovery. Besides these reasons, there is another very competent one. The plaintiff in error was considered as the tenant of defendant, as coming into possession and holding under him, under some contract held to be binding, either made by authority of the defendant in error or ratified by him. Among the conditions was one, that the plaintiff in error should be reimbursed for the repairs he might make. Now it is admitted, that when the action was brought, he had not been reimbursed, though at the time of trial he was. At any rate it was left to the jury, to find whether he was reimbursed at the time of trial, and if they found he was, then whether he was reimbursed or not at the time of action brought, the court said was altogether immaterial, and they should find for the plaintiff below, the defendant in error, with costs. If this were a matter all in equity, the plaintiff in error having a legal right both to the property and to the possession, and the defendant but a mere equity, the cases of *Moody v. Vandyke's lessee*, and *Wharf v. Howell*, might apply. But this is not the case here, for *Thomas* held as a tenant to the defendant in error;

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a tenant who had a lien for the sum beyond his rent which he had advanced in repairs; he had a right to hold the possession until he was paid. It was the duty of *Wright* to call on him for his account, and tender him the balance. *Wright* could not throw up the possession and sue *Thomas* for the repairs. The dissolution of the demise depended on *Wright*, by giving notice to *Thomas*, calling for his account, and paying or tendering him what was due *for repairs*. But there is another objection in the way of the judgment. If *Thomas* held the possession under a contract with *Wright*, or as his tenant for an uncertain time, then most certainly *Wright* could bring no action against him to recover the possession without notice to quit. He had lived on under the contract for several years. It would be then a lease from year to year. In either case, a contract for an indefinite possession in point of time, or a holding *over* which would amount to a lease from year to year, the action could not be sustained without a notice to quit. It was, in contemplation of law, a lease from year to year, and if it depended on the pleasure of *Wright* to end it, he must give notice to quit, *Bedford v. McIlherron*, 2 *Serg. & Rawle*, 50. And if a lease be for one year, and the tenant is afterwards permitted to remain from year to year, a notice in the first month of a new year is illegal; the tenant has a right to hold for that year, *Fahnestock v. Faustenbauer*, 5 *Serg. & Rawle*, 174. The error of the District Court consists in supposing, that *Thomas* had but an equity, and *Wright*, the right to the possession. Now the court had before stated, that *Thomas* stood in the light of a tenant to *Wright*, and could not set up even a good outstanding title. All this was very *just*, but it followed that being a tenant, and not allowed to set up an outstanding title, he was the legal tenant, and being subject to the incapacities of a tenant, to controvert the title, he was entitled to all the privileges of a tenant. This possession was a legal one, and his term did not expire until he had notice to quit. If the plaintiff had a perfect cause of action, against which the defendant had no defence at law, but defended himself on the equity of his case, all which equity had been removed since the commencement of the action; then indeed, the court, exercising Chancery powers would only *interpose* to prevent the plaintiff from recovering costs, which would depend altogether on the special circumstances of the case, on a variety of circumstances peculiar to every case: as here the readiness of the party where called upon seasonably to deliver up possession, on payment of reasonable expenditures. But as he was not called upon, nor any demand of possession or offer to adjust the amount due, I do not feel the equity of burdening the defendant with costs. See *Hart v. the executors of Porter*, 5 *Binn.* 223. In *Pennsylvania*, ejectment is frequently made use of to serve the ends of a bill in equity, and in the exercise of the blended jurisdiction of law and equity, our courts from necessity exercise the power by directing a verdict on equitable terms. But here the plaintiff had no right to the possession in point of law. The defendant had

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no necessity to call on the court to interpose their chancery powers to relieve him on some principle of equity; for if he was, as they considered him, a tenant, then until notice to quit had been given, and offer to pay for the repairs beyond the rents had been made, he stood firm on legal grounds.

Judgment reversed.

M'CREADY and another, trustees of ENOCH THOMAS *against*
the Guardians of the Poor.

SAME *against* SAME.

IN ERROR.

[PHILADELPHIA, DEC. 23, 1822.]

Under the domestic attachment act of 4th *December*, 1807, three trustees must be appointed and must qualify, before any can act: but if one afterwards die, the survivors may sue as trustees.

In an action of trespass or trover, by two of the trustees, the court, after verdict, will presume, that all three were appointed and qualified, and that one is since dead.

Where a number of persons are entrusted with powers of a general nature, and all are assembled, a majority may act, if regular notice has been given. But where a certain number of trustees are by act of assembly to be appointed and sworn, all must be appointed and sworn, before a majority can act, though the law vests in the majority all the powers of the whole.

In trespass for mesne profits, the defendant is concluded by the recovery against him in the ejectment, as to the title of the plaintiff.

Trespass for mesne profits lies against a corporation.

The guardians of the poor of the city and districts are liable in trespass for mesne profits, and in trover.

THESE were two suits in the District Court, for the city and county of *Philadelphia*, brought by *Bernard M'Cready* and *Nathan R. Potts*, trustees of *Enoch Thomas*, an absconding debtor, against the guardians of the poor of the city of *Philadelphia*, district of *Southwark*, and township of the *Northern Liberties*, removed to this court by writs of error, in both of which there were verdicts for the plaintiff, and the District court entered judgments for the defendants.

The first was an action of trespass for mesne profits of a certain lot of ground with the buildings. The declaration stated the plaintiffs to be trustees, and was in their names alone as such: no mention being made of any other trustee. The record stated a verdict for the plaintiffs on the 24th *April*, 1821, subject to the opinion of the court on certain points of law reserved, but these points of law were not mentioned; and that on the 26th *April*, judgment *nisi* was rendered on the verdict. It then proceeded thus: "and now 27th *April*, 1821, *S. Ewing*, for the defendants, moves for a rule to show cause, why there should not be a new trial on reasons filed." On the 25th *May*, 1821, an ad-

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ditional reason for a new trial and in arrest of judgment was filed, namely, "because the suit was brought by two trustees on a domestic attachment, and the suit cannot be maintained by two trustees." And on the 15th *February*, 1822, after argument, the court ordered judgment to be entered for the defendants, on the ground stated in the additional reason filed by the defendants on the 25th *May*, 1821.

The other suit was an action of trover, in which the declaration was in the same form, and the record, after stating a verdict for the plaintiffs for 250 dollars, subject to the opinion of the court on points reserved, proceeded thus: "And now, *May*, 21st, 1821, *S. Ewing*, for the defendants, moves for a rule to show cause, why the verdict should not be set aside, and a new trial granted, for reasons filed. *May* 22d, 1821, rule granted by the court, to show cause, why there should not be a new trial. Afterwards, at the District Court held at *Philadelphia*, for the city and county of *Philadelphia*, on the 15th *February*, 1822, after argument, the court order judgment to be entered for the defendants."

Randall, for the plaintiff in error, contended, that the only point on which it appeared from the record, that the court below entered judgment for the defendants, was, that a majority of the trustees of an absconding debtor could not maintain an action. They could not have entered judgment for the defendants on the points reserved; because the proper course to take, if they were of opinion with the defendants on these points, was to grant a new trial. *Jones v. Hughes*, 5 *Serg. and Rawle*, 299, 303. That a majority of the trustees appointed under the domestic attachment act of 4th *December*, 1807, may maintain a suit, and exercise all the powers vested by the act, is apparent from the 12th section of that act, *Purd. Dig.* 35, which enacts, that a majority may exercise all the powers and perform the duties therein given to and required of them. One of these powers, by sect. 11, *Purd. Dig.* 33, is, to sue for and recover the estate of the debtor, and all debts and things in action due or belonging to him. If the omission of the name of another trustee were informal, the 7th section of the act of 4th *March*, 1818, *Purd. Dig.* 28. cures the defect.

Mahany and *Scott*, contra.

If it appear from the record, that the plaintiffs cannot have judgment, the court will affirm the judgment entered for the defendants. We contend, that two trustees as such cannot bring an action. The act of the 4th *December*, 1807, sect. 3. *Purd. Dig.* 33, makes it the duty of the court, to appoint three persons to be trustees for the creditors, with power to settle the estate, and make report to the court; and they are required, before they proceed, to take an oath or affirmation to execute the trust. It ought to appear that three were appointed, and that they were all duly qualified. They are a special tribunal, and must be legally organized before any of

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them can act. They are bound to pursue their powers strictly. *Cowp.* 26. In the case of *Broad-street road continued*, 7 *Serg.* and *Rawle*, 444, it was held, that the whole twelve viewers appointed, must be sworn, and that if only ten of them are sworn, and proceed to act, their proceedings are irregular: and there the act authorised any ten of them to make the view. So here, the majority, if empowered to maintain actions, must mean a majority of the trustees duly qualified, and it ought to appear in the declaration, that such was the case. In the analogous case under the insolvent law of the 26th *March*, 1814, it is said by the CHIEF JUSTICE, that where the court appoint two trustees, one has no power to act. The bringing of an action is the exercising of a power which the act intended in the 12th section, when it authorised a majority to act. It resembles the case of executors. One executor may act; he may release a debt, but he cannot bring an action. When a suit is referred to three, judgment to be entered on the award of them or any two of them, all three must be convened.

But there is a further objection to the first suit. It is an action of trespass against the defendants as a corporation, and trespass will not lie against a corporation. Individuals may be liable; but a corporation cannot be guilty of a tort; it cannot commit force. *The Chesnut Hill and Spring house turnpike company v. Rutter.* 4 *Serg.* and *Rawle*, 6, was an action of trespass on the case. No replevin lies against them by the name of their corporation. 2 *Bac. Ab.* 11. *E.* 2 cites *Brownl.* 175. Moreover, the defendants in these suits are a corporation of a peculiar kind; they hold no property, but in trust for the poor. They have no fund, out of which the amount recovered in such actions is to be defrayed. They are elected by the corporations of their respective districts, to take care of, and expend certain monies in public charity. Those individuals who have been guilty of misbehaviour in their capacity as guardians, ought to be compelled to pay for the wrong, and not the corporate body, or the public, who have appropriated no funds for such purposes. In *Riddle v. the Proprietors of the locks and canals on Merrimack river*, 7 *Mass. Rep.* the court distinguish between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent called sometimes, *quasi* corporations, and say, that no private action can be maintained against the latter, for breach of corporate duty, unless such action be given by statute; because they have no corporate fund, and no legal means of obtaining one. In the present case, the defendants have no corporate fund for the purpose of paying damages recovered, nor means of obtaining one by taxes or otherwise, and therefore an action for damages against them ought not to be sustained.

Randall, in reply. The principle is a general one, that wherever a body is of a public nature, a majority may act. In a com-

(McCready and another, trustees of Enoch Thomas v. the Guardians of the Poor, &c.)

mission of bankruptcy a majority of the commissioners always act. In courts, though one judge dies, the rest proceed during the vacancy. Even in this very corporation, who are defendants in the present case, a majority are authorised to act. *Purd. Dig.* 537. sect. 4, 5, 6, 7. It was impossible for the legislature to vest the powers of the whole in the majority by stronger language than that used in the 12th section. They "may exercise all the powers, and perform all the duties, therein given to and required of them." These words clearly embrace the right to institute and maintain actions, without which the estate of the debtor could not be collected. But if the objection were available, the defendants were bound to take advantage of it by a plea in abatement. *Pringle v. Gaw.* 5 *Serg. & Rawle*, 537. It is also, a sufficient answer to the objection in the first action, that it is trespass for mesne profits, and that in this action, the defendants are estopped to controvert the title. It is consequential to the ejectment, and the defendant is concluded by the judgment in the ejectment. *Aslyn v. Parkyn.* 2 *Burr.* 666. *Baron v. Abeel.* 3 *Johns.* 481. As to the objection, that trespass does not lie against a corporation, it is now well settled, that it does. In the *Chesnut Hill and Spring house turnpike company v. Rutter*, 4 *Serg. and Rawle*, 6, several cases of this kind are cited by the CHIEF JUSTICE in delivering the opinion of the court; and no doubt seems to be entertained in that case, that they are liable generally for torts. Nor is the corporation we have sued of the nature of a *quasi* corporation, and on that ground exempted from a private action, unless given by statute. It is a complete corporation aggregate, with all the powers of such a body, possessing funds of an ample description, and falls within the class of corporations admitted by the court in the case from 7 *Mass. Rep.* to be liable to be sued. It is true there are no funds specially appropriated to defray damages for trespasses. Such an appropriation would be novel. But there is no reason in law or justice, why they should invade and enjoy the property of individuals, without being obliged to make retribution.

The opinion of the court was delivered by

DUNCAN, J. This was an action of trespass for mesne profits of a certain lot of ground with the buildings, brought by the plaintiffs, two of the trustees of *Enoch Thomas*, an absconding debtor, in which there was a verdict for the plaintiffs, and on the verdict the District Court entered judgment for the defendants.

This court can only examine and decide on the record. A writ of error will not lie on a point reserved for the opinion of the court; if either party intends or expects a writ of error, it behoves him to spread the facts on the record before the jury in a special verdict or statement of facts agreed by the parties to stand as a special finding by the jury; and the consent of parties cannot give this court jurisdiction. But this record neither states a case, nor a point of

(M'Cready and another, trustees of Enoch Thomas v. the Guardians of the Poor, &c.)

law reserved. On the 24th *April*, 1821, a verdict was given for the plaintiffs, subject to the opinion of the court, on certain points of law reserved. What these points were, the record does not inform us. On this verdict on the 26th *April*, judgment *nisi* was entered. We must suppose, that the points of law were decided in favour of the plaintiffs; for the record proceeds thus:—“And now, 27th *April*, 1821, *S. Ewing*, for defendants, moves for a rule to show cause, why there should not be a new trial on reasons filed;” and on the 25th *May*, 1821, an additional reason for a new trial, and in arrest of judgment, was filed, “because the suit was brought by two trustees in a domestic attachment, and the suit cannot be maintained by two trustees.” And on the 15th *February*, 1822, after argument, the court ordered judgment to be entered for the defendants, on the grounds stated in the additional reason filed by the defendants on the 25th *May*, 1821. The reason assigned for entering judgment for the defendants is simply this; that two trustees cannot support any action. If it had appeared on the record, that only these two had qualified and undertaken the duties of the appointment, and this only could appear, as it would be matter of evidence, by bill of exceptions or opinion of the court, filed under the act of assembly, I should agree with the District Court. But *non constat*, whether the three trustees did not accept and qualify, and that the estate of the absconding debtor become vested in them; that they had taken possession of it, and were disseised by the present defendants, and one of them had died; and *non constat*, but he died after verdict in ejectment, on which recovery in ejectment, this action could alone be predicated and supported, and after a verdict such would be the presumption of law. There was nothing in the objection when made after verdict, where it must be presumed, *that all the competent proof which could be made in support of the action was made.*

A judgment is not to be arrested, however defectively the title be stated, if the title itself does not appear to be defective; in this action it was not incumbent on the plaintiffs to set out their title; this was all matter of evidence. How they became seised, was not a natural and necessary allegation in the declaration, though it would be a necessary part of the proof on trial. In ejectment or trespass, the plaintiff only sets out that the defendants broke and entered his close; he sets out the close to be his; but how his, he must prove on the trial, in ejectment. On demise by a corporation, and verdict for the defendants, it was moved in arrest of judgment, that it did not appear by the record, that the demise was by deed or under seal of the corporation, and it was adjudged *it was aided by the verdict.* *Patridge v. Ball*, 1 *Ld. Raym.* 130. *Carth.* 390. The record did not show a title void in itself; its validity depended on facts to be proved in the cause, all of which were put in issue on the plea of not guilty.

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The domestic attachment law of 4th Dec. 1807, *Purd. Dig.* 32. sect. 3. provides, "that it shall be the duty of the court on the return of the writ, to appoint three honest and discreet men to be trustees to the creditors of such absconding debtor, with power to audit the accounts and adjust the demands of all the defendant's creditors, and to settle the shares and proportions of the defendant's estate, and make report to the court; *and the said trustees shall, before they proceed, take an oath or affirmation, to be administered by the court appointing them, well and truly to execute the trust reposed in them.*" The 4th sect. provides, "that the said trustees shall and may take into their possession all the estate of such debtor, and all books, vouchers and papers respecting the same, *and shall be deemed vested with the estate of such debtor,* at the time of issuing the attachment, and shall be capable of suing for and recovering the same; and all the debts, &c. attached, shall be delivered over by the sheriff to the trustees." The 12th sect. enacts, "that a *majority of said trustees* may exercise all the powers and perform all the duties therein given to and required of them; and in case of vacancy, the court shall supply the same by new appointment or appointments." These trustees, though not standing commissioners or a permanent body, and appointed only for the management of the estate of the absconding debtor, yet as it is a species of public trust, as they were trustees for the whole body of creditors, to transact the affairs of others, who have no voice in their appointment, were *quasi* a public body—ministerial officers.

In all matters of public concern, the voice of the majority must govern. Whether the statute expressly *authorises* a majority to act, or is silent, the principle to be extracted from the numerous cases on this head, is, that where a number of persons are entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are assembled, the majority will conclude the minority. See *Co. Litt.* 185. To this I would add, if regular notice be given to all, the majority, when they have met, become just as competent to decide, as if the whole had met; and in contemplation of law, it is the act of all. The majority had power to act by the express terms of the law; but it was not a power *nominatim* to A. B. and C.; but to three trustees, who, before they proceeded, were all to take an oath to act justly, and to discharge their duties faithfully to the best of their skill; therefore, the principle stated, does not come up to this question. Where an act confers an authority on three, and requires a particular qualification, making that qualification a condition precedent, it seems to me, that to give the body a legal existence, it must consist of the required number, not only to be nominated, but to be qualified to act: that until the whole number accept and are qualified, it cannot be said, that there are three *trustees*; consequently, where

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there are but two who accept and qualify, they cannot be said to be a majority of the trustees; for the person nominated, but not accepting, cannot be called a trustee. The court are to go on to nominate until the board of trustees is filled. These men are not judicial officers; but are ministerial officers *of justice*. Until there are three trustees *in office*, the estate cannot vest in them. The 4th section confers the possession of the absconding debtor's estate in the three trustees; and the said trustees, (that is the three trustees and not a *majority* of them,) shall be deemed vested with the estate of the debtor—it is a joint estate. The power is given to the majority to *act*; but the estate is vested in the three jointly. The majority certainly have a right to sue; but not in the names of two, if three are in full life, and continue trustees. The act of the majority would bind the dissentient, and court would not suffer him to disavow, discontinue, or release the action; because the act of the majority is the act of the whole body; but if one of them die, the majority is competent to sue. It may be compared to the case of executors, in whom the testator vests his estate, directing them *to sell*. The survivor *may sell*, for it is not a vested authority, but an authority coupled with the estate; but a mere vested power to executors to sell, does not warrant a sale by the survivor at the common law, but by act of assembly the survivor may sell in both cases. If the title be deemed vested in the competent number of qualified trustees, and one died, it could not lie in *nubibus* until the vacancy was supplied, it must either remain in the survivors, or be remitted to the absconding debtor; the latter would be a construction which could never be seriously maintained. I go no further than the case requires—I speak only of a suit brought by two, when the third has died, after acceptance of the appointment and qualification. Nor do I give any opinion as to corporate bodies or courts of justice. If the evidence had been set out, and the opinion of the court on it filed, according to the act of assembly, or bill of *exceptions* stating the fact that one had never accepted or *qualified*, that there never were three trustees, in a common action, the court would have acted erroneously if they had not instructed the jury that two could not support the action. But if the whole evidence had been spread on the record, it is quite clear, that the present plaintiffs could recover the mesne profits; at least from the time of bringing their ejectment until the recovery in ejectment, for the plaintiffs by producing the verdict and judgment in ejectment had shown enough to entitle them to recover some mesne profits; for the production of that record would have estopped the defendants *in this action*, (who took defence in the ejectment, for if they were not parties in the ejectment, there could be no recovery in the action for the mesne profits.) In the action of ejectment formerly the damages were given for the mesne profits; indeed in the origin of the action damages only were recoverable, (the term was not recovered;) but this has

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long grown into disuse, and this action is the only one in which mesne profits can be recovered, and though the form of proceeding in the ejectment be changed by act of *assembly*, yet the remedy is substantially the same, for the legislature have wisely given it this effect and no other, except that two verdicts and judgments in ejectment are conclusive on the right; for the supplement to the original act, 13th *April*, 1807, enacts, that it shall give *remedy as fully and effectually as in ejectments in the form heretofore used*. This action is consequential to, and results from the ejectment, it is a consequence of the recovery in ejectment. Beyond the time of demise in the old form, beyond the time of action brought in the new, the recovery in ejectment proves nothing at all, because beyond that time the plaintiff alleged no title, nor could he be put to prove any, *Aslin v. Parkyn* 2 *Burr*. 667.

And it is settled on principle, that after a recovery in ejectment, the defendant is estopped from controverting the plaintiff's title in a subsequent action, provided the plaintiff only proceeds for mesne profits from the time of the ouster complained of in the ejectment. But if he proceeds for antecedent profits he must prove his right to the premises from which they arose to show his right to recover them. So that the plaintiff's right to recover something could not be questioned. There appears therefore, on the record no ground to arrest the judgment, unless the last position of the counsel of the defendant in error be tenable. That position is, that trespass *vi et armis* will not lie against any corporation, and that no action will lie against this corporation. To this it may be answered, that though the action be in form of trespass, yet it is in effect to recover rents and profits received by the defendants, and in which the actual trespass is not required to be proved, there being only two objects of inquiry, length of time and value of the premises. But the main question was settled in this court, in the *Philadelphia and Springhouse Turnpike Company against Rutter*, 4 *Serg. & Rawle*, 6. There the Chief Justice considered the question very fully, and proved, by a series of authorities, that actions for torts, trespasses on land, trespass *vi et armis*, from the earliest ages of the law, had been supported against corporations, and incontestibly showed, that there is no solid ground for distinction between torts and contracts, and there is certainly less difference between trespass on the case and trespass *vi et armis*, where the shades of difference are so indistinct that it has sometimes puzzled the most acute counsel and ablest judges to perceive the difference, or mark the distinction in any plain intelligible language.

It seems to be admitted that if the entry complained of was done by an agent of the corporation under the corporation seal the action could be supported. This, if it were necessary, would be presumed after a verdict. I do not say, that a corporation would be responsible in trespass for every outrage committed by their ser-

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vants or agents. The act must appear to be done by their authority, not express, but implied from its own nature, in the prosecution of some corporate claim, in the exercise of some corporate right, and in such case where the act done would be within the scope of corporate claims, it would not be necessary to show the authority or mandate under corporate seal. This body, if only a corporation *sub modo* have a capacity to sue and be sued co-extensive with their corporation rights and duties, but they are erected into a body corporate and politic. By the act of 28th March, 1803, *Purd. Dig.* 537, they are declared to be a body politic and corporate, and have power to take and hold lands, to sue and implead, and are liable to be sued and impleaded. From the inspection of this record, it appears, not only that judgment was arrested on the plaintiffs verdict, but judgment was entered on that verdict for the defendants, and this court cannot see any cause for this. No bill of exception, no special finding of the jury, no facts spread on the record, by which it would appear, that the plaintiffs had no cause of action, and after a verdict it must be presumed that they gave evidence to support their title, to show a right to recover, unless their own declaration shows a defective title, which no evidence could support or verdict cure. As this is a writ of error by the plaintiffs below, and the judgment for the defendants is erroneous, it is the duty of the court not only to reverse that judgment, but to give such judgment as the District court ought to have given.

Judgment reversed and judgment for the plaintiffs.

In the other cause the following opinion of the court was delivered by

DUNCAN, J. This case cannot be distinguished from the foregoing one between the same parties, except that it is an action of trover, and the only question is, can an action of trover be maintained against a corporation? If trespass *vi et armis* may, then a *fortiori*, trover can. If a corporation can disseise, and be liable in trespass as disseisors, then doubtless a corporation may be guilty of conversion of another's chattles: and if it were necessary, which it is not, to prove the detention of the goods by authority of the corporation, under their seal, after verdict, such authority must be presumed; and the further presumption may be fully made, and it is the duty of the court to make it after verdict that all the trustees qualified, that these goods came into their hands and possession, that during the life time of the third trustee they were converted by the defendants; consequently, the action could be sustained by the two survivors, the property being vested in the three, they would be joint tenants, and the right of action survive to the majority.

Judgment reversed and judgment entered for the plaintiffs.

[PHILADELPHIA, DEC. 23, 1822.]

WELLS *against* the Philadelphia Insurance Company.

On the 23d of *July*, 1819, A., who was going out as supercargo of the ship *America*, on a voyage from *New York* to the *Isle of France*, and *Calcutta*, and back, by a writing, reciting that he was indebted to B. in 2500 dollars, engaged to ship and consign to B. goods to that amount, arising from his outward commissions, and in case of death, or any accident happening to him, assigned his commissions on the above voyage, and the proceeds thereof, to B., and by another writing, of the same date, authorised B. to make insurance for 2500 dollars on his commissions out, and the proceeds thereof out and home. On the 10th *July*, A. caused insurance to be made in *New York*, for 4000 dollars, for himself on commissions out and home, and delivered the policy to C. On the 15th *August*, B. had insurance made by the defendants, in *Philadelphia*, for 2500 dollars, on commissions of A., valued at the sum insured out, and on the proceeds of said commissions, as interest might appear, homeward, with the usual clause as to a prior insurance. On the voyage home, the ship was wrecked, and A. drowned; but B. received an invoice and bill of lading of goods consigned to him on account of A. by the ship, amounting to 1500 dollars, some of the goods were saved, and claimed and received by the *New York* underwriters, who paid part of their policy on a compromise with C. *Held*,

1. That this was not a case of double insurance, that at *New York*, and that at *Philadelphia* being on account, and for the benefit of different persons.
2. The plaintiff had an insurable interest.
3. He was not bound to disclose to the defendant the particular nature of his interest.

THIS was an action on a policy of insurance underwritten by the defendants, tried before DUNCAN, J. at *Nisi Prius*, where a verdict was found for the plaintiff, for 1624 dollars, 36 cents, and costs, subject to the opinion of the court; judgment for the plaintiff, or judgment of nonsuit to be entered, according to the opinion of the court.

The policy was dated 15th *August*, 1818, for 2500 dollars, "on commissions of *William A. Field*, supercargo of the ship *America*, valued at the sum insured out, and on the proceeds of said commissions, as interest may appear, homeward." The voyage was from *New York* to the *Isle of France*, with liberty of the *Isle of Bourbon*, two ports in *Java*, and *Calcutta*, and back to a port in the *United States*. The policy, as usual recited, that "*Richard H. Wells*, (the plaintiff,) as well in his own name, as for and in the name or names of all and every other person or persons to whom the property insured did, might, or should appertain, in part or in whole, did make insurance, &c." *William A. Field* and *Emslie Garrigues*, were joint supercargoes of the *America*, and *Field's* share of the commissions for the voyage round, with premium to cover, amounted to about 4000 dollars. Prior to the date of the policy, on the 3d *July*, 1818, *Field*, by a writing under his hand and seal, reciting that he was indebted to the plaintiff in the sum of 2500 dollars, engaged to ship goods to that amount, arising out of his outward commissions on this voyage, and to consign the said shipment to the plaintiff, for the purpose of liquidating the said debt. Then followed this clause: "and in case of my death, or

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any accident happening to me, I do hereby assign, transfer, and set over to the said *Richard H. Wells*, my commissions on the above voyage, and the proceeds thereof, for the purpose of liquidating his debt." And by another writing of the same date, *Field* authorised the plaintiff to effect insurance *on his own account* for 2500 dollars on his commissions, and the proceeds thereof, out and home, and to recover and receive the same for his own use in case of loss. On the 10th *July*, 1818, *Field* had insurance made at *New York*, for himself, by the Firemen Insurance Company, in the name of *N. G. Minturn & Co.* for the sum of 4000 dollars "on commissions." The policy was open both out and home. It did not appear that this insurance was known to the plaintiff. The policy was left by *Field* in the hands of *Archer*, prior to his embarking in the ship *America*, but was not assigned to *Archer* or any other person. The ship was wrecked near *Sandy Hook*, on her homeward voyage, bound to *Philadelphia*, in the month of *December*, 1819, and *Field* who was on board, was drowned. The plaintiff received, under a blank cover, unaccompanied with any letter of advice, an invoice and bill of lading of goods shipped *June 20th*, 1819, by *Garrigues* and *Field*, on account and risk of *Field*, and consigned to the plaintiff, by the ship *America* at *Calcutta* bound to *Philadelphia*; amount about 1500 dollars. Some of the goods were saved from the wreck and sold; the proceeds thereof, (deducting the salvage,) were paid to the *New York* Firemen Insurance Company, who claimed the same as underwriters, on the first policy. It was understood that this company paid part of the sum insured by them on a compromise without suit. The plaintiff's claim was for a total loss on the goods consigned to him. In this policy there was the clause usual here, that if the said insured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured, such amount being understood to be the whole sum underwritten without any deduction for the insolvency of all or any of the underwriters: and that this policy so far as the same has been previously insured, shall be considered null and void to all intents and purposes, and the said *Philadelphia* Insurance Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from: and in case of any insurance upon the said premises subsequent in date to this policy the said *Philadelphia* Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereunto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made."

Binney, for the defendants, contended, that it was incumbent on the plaintiffs to show that the goods were purchased with the pro-

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ceeds of the commissions of *William A. Field*, and there was no evidence of that. He then insisted on two points. 1. That here was a double insurance, and the latter one was therefore void. 2. That if that were not the case, the plaintiff could not recover, by virtue of any special contract he may have made under his agreement with *Field* on the 3d *July*, 1818, on this policy.

1. The insurance in *New York* was a prior insurance, of the same interest and the same risk. The subject insured there was *W. A. Field's* commissions as supercago; and this covers goods, the proceeds of the commissions out, shipped home, though not mentioned as goods. It is the usage of this trade for the supercargoes to receive their commissions at the termination of the outward voyage, and there to invest them in goods to be shipped home. In *Holbrook v. Brown*, 2 *Mass Rep.* 280, a policy was effected on property in the brig *Lavinia*; the interest proved was a right to commissions on arrival. It was held to be covered by this policy. The *New York* insurance company have paid the loss in this case, which shows their idea of the meaning of their policy. The compromise was made from some difficulty which existed in proving *Field's* interest. It appears to have been intended to insure the general property of *Field* at the *Philadelphia* office, and not any special interest. I grant, that if several persons have several interests in the same property, they may make several insurances: but where the same interest is insured by two persons, it is a double insurance. The agreement of the 3d *July*, 1818, shows, that the commissions of *Field* were to be insured, and not *Wells'* interest in those commissions. The defendants, if they are held liable, will suffer by the course which things have taken. The *New York* company having made the first insurance, are entitled to the salvage on the goods which were saved. The defendants, were, therefore, deceived, inasmuch as they supposed, that by the insurance they effected, they would be entitled to the benefit of salvage. They contemplated insuring only the general property of *Field*.

2. He that intends to cover any thing different from the general interest, must specify it. The plaintiff, if he intended to cover a special or qualified interest under this insurance, was bound to apprise the underwriters of it, and cannot now introduce it under general words, which are ordinarily applied to a general interest. Of this there are various instances. An insurance on a ship does not cover a bottomry interest: nor an insurance on goods a respondentia interest. *Cheriot v. Barker*, 2 *Johns.* 346. *Glover v. Black*, 3 *Burr.* 1394. Bottomry interest must be insured *eo nomine*. *Kenny v. Clarkson*, 1 *Johns.* 385. *Robertson v. United Insurance Company*, 2 *Johns. Cas.* 250. In *Russel v. Union Insurance Company*, 1 *Condy's Marsh.* 105, 4 *Dall.* 424, where there was a lien, the court said in their charge, that the plaintiffs should have disclosed to the defendants the nature of the interest meant to be insured, to prevent a fraud upon the underwriters,

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though it need not be inserted in the policy. In *Donath v. Insurance Company of North America, Condry's Marsh.* 311. note, 4 *Dall.* 463, it is held, that if a factor wishes to insure, he should describe his interest: for when he insured in the name of his principal, and the goods having been captured, were restored to the principal, the factor was not allowed to abandon and recover of the insurers the amount of his lien.

C. J. Ingersoll, for the plaintiff.

1. This is by no means the case of a double insurance. A double insurance is where there are two insurances on the same risk and the same interest. But these insurances were not on the same interest. The *New York* insurance was on commissions out and home. The *Philadelphia* insurance was on commissions out, and the proceeds of those commissions home. Goods, the proceeds of commissions, are not the same as commissions, and were not covered by the *New York* policy. The *New York* insurers were not entitled to the salvage; it belonged to the *Philadelphia* insurers, who were on the goods. Besides, if the things be considered the same, the insurances are by different persons, on different interests in it: and the proviso only applies to the same person's having made a prior insurance. Two persons may insure different interests in the same thing, each for the whole, *Godin v. the London Assurance Company.* 1 *Burr.* 489. 1 *Marsh.* 150. *Well's* interest was distinct from *Field's*, and as such separately insurable on his account.

2. There is no necessity of a specification of the particular kind of interest belonging to the insured. The rule is the other way, except in the case of respondentia, where, by the custom of merchants, it has been insured under that denomination, and therefore the court would not allow that it should be insured under the denomination of goods. *Glover v. Black*, 1 *Marsh.* 319. 3 *Burr.* 1394, and bottomry falls within the exception, 1 *Johns.* 385. But in *Glover v. Black*, Lord Mansfield intimates, that under an insurance on goods at large, a man may be permitted to give in evidence a mortgage, or other special lien, *Ib.* Insurance "on property on board," covers commissions. *Holbrook v. Brown*, 2 *Mass. Rep.* 280. 3 *Mass. Rep.* 133. In *Russel v. Union Insurance Company* a lien on a cargo was covered by an insurance on goods, 4 *Dall.* 421. Insurance "on freight advanced" was held to embrace an interest in the tonnage of a ship for a voyage. *Sansom v. Ball*, 4 *Dall.* 459. 1 *Marsh.* 117, *a*, note. *Le Cras v. Hughes*, 1 *Marsh.* 108. *Crawford v. Hunter*, *Ib.* 110. *Hill v. Secretan*, *Ib.* 114, establish the same principle, that the insured is not tied down to a specification of his interest. In the later case of *Carruthers v. Sheddon*, 6 *Taunt.* 14, 1 *Serg. & Lowb.* 293, it was held, that if one of several partners insure goods, he may recover beyond his share of the goods, to the amount of all advances made by him for

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the benefit of the other partners, for which he had a lien on the cargo. Besides, this policy does specify the thing insured: the insurance is for *Wells* on the commissions of *Field*. Here was no concealment, but the defendants were told that *Well's* had an interest in *Field's* commissions. It is objected, that it was not proved that these goods were purchased with the proceeds of *Field's* commissions. But the answer is, that the bill of lading and invoice were sent under a blank cover to the plaintiff: that *Field* had agreed to consign the goods to him. The goods, it is true, are said in the bill of lading to be shipped by *Field* and *Garrigues*, but then it is on account and risk of *Field*.

The opinion of the court was delivered by

TILGHMAN, C. J. The plaintiff's claim is for a total loss on the goods consigned to him, and this claim is resisted by the defendants on two grounds—1st. That there was a double insurance. 2d. That if the plaintiff sets up a special, insurable interest, in himself, he ought to have made it known to the underwriters when he gave the order for insurance.

1. The first thing that strikes us in this transaction is, that it is perfectly fair on the part of the plaintiff. He paid the premium which was asked, on an insurance for 2500 dollars, and he certainly had reason to think that he had an interest to that amount. There was no evidence of his having had any knowledge of the insurance effected by *Field* in *New York* on his own account, and if so, and the insurance made at the office of the defendants was for himself, there is nothing in the case like a double insurance. A double insurance, is where the same person has insurance made on the full value of his interest, in different policies. Whether made in his own name, or the name of others, is immaterial, so that he is to have the benefit of both policies. Such would have been the case, if after insurance made in *New York* on account of *Field*, another insurance on the same object had been made here, also on his account, in the name of the plaintiff. But the fact was otherwise. The insurance made by the defendants in the name of the plaintiff, was intended by the plaintiff to be for his own benefit. Whether he had an interest which warranted an insurance for himself, is a question to be considered hereafter. For the present, it is to be supposed that he had, and then, the insurance made at *New York*, and that made here, being on account, and for the benefit of different persons, there was not a double insurance.

2. But had the plaintiff an insurable interest? There is no difficulty in answering that question. He certainly had. At the time of effecting the insurance, he had the written engagement of *Field*, to consign to him, goods to the amount of the sum insured, which were to be purchased by *Field*, in *India*, with the money to be received there, for his commissions. This is the well known course of trade. The consignees received their commissions in cash, at the

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end of the outward voyage, which they invest in goods to be brought home. This is what was meant by *the proceeds of said commissions*. The plaintiff had not only the covenant of *Field* to consign the goods to him, but in case of his death, an assignment of all his commissions on the whole voyage, and the proceeds thereof. And it seems, *Field* was anxious to comply with his engagement. For although he embarked on the homeward voyage, yet he took care to consign the goods to the plaintiff. The policy underwritten by the defendants was *valued* on the commissions, out, and open on the proceeds thereof home. It lay upon the plaintiff to prove the amount of his interest on the homeward voyage, and he did so. He had an interest in the goods consigned to him, to their full amount, for they fell short of his debt. But it is objected, (and that is the only point that has had any weight with me,) that he ought to have disclosed to the defendants the particular nature of his interest. This case has been likened to an insurance on a bottomry, or respondentia interest, which cannot be covered by an insurance on goods. The law is so, without doubt, but the cases are not parallel. These are contracts, which, in case of loss, exclude the insurer from all possibility of benefit of salvage, and therefore he ought not to be drawn into them blindfold. But the interest of the plaintiff was in the goods. The least that can be said, is, that he had a lien on them to their full amount. In the case of *Caruthers v. Sheddon*, (6 Taunt. 14.) it was decided, that where one of several partners, made insurance on goods, he might recover beyond his share of the goods, to the amount of all advances made by him for the benefit of the other partners, and *for which he had a lien on the cargo*. The present policy was in the name of the plaintiff, and distinctly pointed out the object of insurance, viz. *Field's* commissions out, and the proceeds of them home. The defendants must have known that it was very possible for the plaintiff to have an interest in these commissions and their proceeds, and the policy was so drawn that there could be no recovery without proof of interest. The *New York* company compromised on their policy, so that nothing is to be inferred from the payment made by them. I will only remark, that the holder of that policy might have found some difficulty in recovering at law, as it would have been incumbent on him to prove the interest of *Field*, which might not have been so easy a task, had the underwriters been fully apprized of all that had passed between *Field* and the plaintiff. On the whole, I am of opinion, that the plaintiff is entitled to recover.

[PHILADELPHIA, DEC. 23, 1822.]

BURD and another *against* RAMSAY.

CASE STATED.

Taxes due for seated lands are not a lien on real estate, but only a personal charge against the owner or occupant.

The defendant was indebted to the plaintiffs on an assigned mortgage, dated the 16th *January*, 1812. Judgment was entered by the plaintiffs on the bond accompanying the mortgage, on the 12th *November*, 1817. On the *alias venditioni* thereon, returnable to *December* Term, 1820, a sale was made on the 20th *November*, 1820, of the mortgaged premises, on the following conditions: "Cash in ten days, or the property sold again at the risk of the purchaser: all arrears of ground rent and taxes will be paid out of the purchase money, if the bills thereof are brought to the sheriff's office within ten days from the time of sale, after which the property will be accountable." The premises were purchased by the plaintiffs. The sale, exclusive of taxes, after deducting costs and arrears of ground rent, produced less than the debt and interest, for which the execution issued. A bill against the defendant for the taxes of the years 1818 and 1819, was presented to the sheriff by the collector, within the ten days, which the plaintiffs objected to his paying, and they gave verbal notice to the collector to collect the taxes from the premises, which was afterwards repeated on the 21st *December*, 1820. A distress was afterwards made, and abandoned by the collector. The defendant, prior to the year 1819, resided on the mortgaged premises, and still resides there. The property on the premises had been assigned for the benefit of creditors, previous to the distress.

The question for the opinion of the court is, whether the plaintiffs are not entitled to take out of court the sum claimed by the collector for taxes, on the ground that they were not a lien on the premises sold.

Gibson, for the plaintiffs, referred to the 7th, 8th, 12th, 15th, 16th, 18th, 19th, 20th, 21st, and 23d sections of the act 11th *April*, 1799, entitled, "An Act to raise and collect county rates and levies," *Purd. Dig.* 100, to show that the taxes were merely a personal charge, and are no where in any part of the act relating to this subject, declared to be a lien on land, or treated as such. They are assessed on the person in respect of property real or personal, and the remedy for their recovery is personal, by distress and sale of goods, or imprisonment of the person of the delinquent, where goods cannot be found.

There is a lien created by the act: but it is on the property of the collector, and even that is limited to two years. The express creation of a lien in this case shows, that the legislature did not intend a lien for the tax, or they would have provided for it in the same

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manner. Liens on land are matters of positive enactment; they are attended with inconveniences in many instances, and ought not to be implied on slight grounds. The great object of the law was, that the taxes should be speedily collected; within one year: and if they were a lien until paid, it would induce the collector, and all concerned, to relax in the performance of their duty. Besides, if they were a lien, there is no mode by which it can be enforced: no proceedings of sale of lands can take place by the authority of the collectors. In the case of unseated lands, which are expressly subjected to sale for non-payment of taxes, the legislature have provided a specific remedy to enforce the lien: and if they had contemplated it in respect to other real estate, they would have carefully established a system by which the title might be transferred, and rendered secure to a purchaser. It is a strong argument against the lien, that in the case of unseated lands, the law expressly provides the lien, and gives a remedy for its enforcement.

Binney and Rawle, contra. The usage so far back as it can be traced, has been to treat the taxes as a charge upon land; and such has uniformly been the understanding. When lands have been sold on a *venditioni exponas*, the sheriffs have always paid the arrears of taxes. Some taxes are personal in their nature, or are laid on personal property, or in consequence of occupancy: none of these ought to affect the land: but a tax on land is very different: it ought to be considered as a charge on land unless the contrary be expressed. The remedies against the person and goods are no where described in the acts of assembly as exclusive, and are therefore to be deemed additional remedies which exist with the lien. The lien resembles that of a mortgage, which is not impaired by the existence of a remedy against the person of a mortgagor, or the bond accompanying the mortgage, 3 *P. Wms.* 360. Great inconveniences to the public will ensue, if the land is considered not liable to taxes. A great deal of land belongs to absentees, and it would be absurd to consider that as a personal tax. Where the owner is absent or unknown, the tax must be laid on the land or not at all. The question whether there exists a lien, will be determined by ascertaining whether the tax is treated in the acts of assembly as a charge on the land; for if it be a charge on the land, then it is a lien, in the same manner as the land tax in *England*. *Woodf. Land. & Ten.* 97. *Theed v. Starkey*, 8 *Mod.* 314. *Jeffreys case* 5 *Co.* 67. *Rowls v. Gells*, *Cowp.* 452.

The 7th section of the act of 11th *April*, 1799, directs the commissioners to require the assessors to return the names of all taxable persons, and of all the property made taxable by the 8th section, and to proceed to quota the townships agreeably to the quantity and quality of land and other taxable property. The 8th section contains an enumeration of the articles made taxable, commencing with all lands held by patent, &c. houses and lots of ground, and ground rents. By section 15, the county commissioners are em-

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powered to discharge the collectors only in the case of mistakes or indigent persons. The 16th, and 19th give a very summary process against collectors, but the lien on their lands is to indure only for two years. The reason of this provision is, that two years are a sufficient time to proceed against them to the extremity of the law: but as for lands which are taxed, it would be impossible in all cases to collect the taxes within two years. The 25th section made the goods and chattels of all tenants occupying lands or tenements, liable to be distrained for taxes arising out of the same, as though they were the real owners, with the right of defalcating the tax with the landlord on paying their rent. Whence this provision if the tax on the landlord be personal? The expressions of this section are very strong: it speaks of "taxes arising out of such lands or tenements." This section was repealed by the 6th section of the act of 3d April, 1804, relating to the selling of unseated lands for taxes, *Purd. Dig.* 638, and every tenant, occupying or possessing any lands or tenements, is made liable to pay all the taxes which, during such occupancy or possession, may thereon become due and payable, reserving the right to defalk or recover the same against his landlord. They are liable personally: but they are liable only for those taxes which accrue during their own occupancy: they are not made liable for those which were previously in arrear. Besides, there are many houses unoccupied for several years, the owners of which live out of the state. There is much real estate unoccupied belonging to minors, and to corporations. Transfers are often secretly made, and the owner cannot be known. It is clear, that unoccupied lots in the city of *Philadelphia* cannot be sold as unseated lands: city lots are always mentioned in the acts of assembly as lots. On the 28th March, 1814, *pamph.* 304. there was a special act passed for the sale of the vacant lots in the city of *Philadelphia* for taxes in the same manner as unseated lands, which shows the construction given by the legislature on that point. In most of the states, taxes are a lien on land. Lands may be sold for taxes in *Vermont*, *Rhode Island*, *Connecticut*, and *New York*. In *New Hampshire* improved lands are sold for taxes, under certain circumstances. *Griff. Ans. to Quest. No. 94.* In *Massachusetts* a tax is a lien on land, and not a personal charge, *Rising v. Granger*, 1 *Mass. Rep.* 48. The difficulty of enforcing the lien is made an objection to its existence: but it is of no weight, because there are many cases in which the law establishes a lien, and yet the party has no remedy to enforce it. Goods distrained could not be sold by the landlord at common law. So also an attorney has a lien on his clients papers: an innkeeper on the goods of his guest: the owner of a ship on the goods carried for freight: and these are only a right to hold till payment, but not to sell. Under the law originally passed to give a lien to mechanics, there was no remedy provided for the enforcement of the lien. The legislature has considered the taxes as a lien. In the 21st section of the act of 11th April, 1799, *Purd. Dig.* 105,

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provision is made to compel a sheriff or corner who receives any money for taxes, to pay over the same to the commissioners.

Condy, in reply. It is evident, on considering the different acts of assembly on this point, that the legislature have distinguished lands subject to taxation, into two kinds, unseated and seated: the former yielding no profit, are charged with the tax, and may be sold for it. The latter yielding profit, are not charged with the tax, but the pernor of the profits is liable to the tax. The goods of the occupier, though not on the premises, are liable. The tax cannot be deemed a lien, because a lien on land is a right to enter on the land, and to hold it until the owner pays money. The only lien on land is by mortgage: a judgment is only a charge. The collectors have no right to enter on the land, and take the profits. The land, therefore, is not the debtor. A charge which cannot be carried into effect amounts to nothing. There was an application to the legislature last winter for an act of assembly to make seated lands subject to sale for taxes: but it was refused. The legislature thought there were liens enough already. As to the general understanding on the subject, we conceive it has always been in *Philadelphia* that the taxes are no lien.

The opinion of the court was delivered by

GIBSON, J. The question is whether taxes due for seated lands are a lien on them, or only a personal charge against the owner or occupant. No lien is expressly created by any of the various acts of assembly on the subject, and the inquiry will therefore be, whether an intention to render the taxes a charge on seated lands can be collected from any or all of those acts, by implication. This implication must arise, if at all, from the 4th section of the original act, (act of 11th *April*, 1799,) by which the assessors are requested to take an account of the *names of the taxable inhabitants* within their respective districts, and of certain kinds of property made taxable, among which *land* is mentioned, together with almost every sort of building, as well as ground rents. There would be little doubt if the question depended on this section alone; but I shall presently endeavor to show that it does not. With respect to the taxation of property, the principle adopted by the legislature, that the quantum of the assessment is to be regulated by the quantum of the property possessed, is a principle of natural justice, which has, I believe, been recognized by every legislature in the union; and to give full effect to it in practice, it was absolutely necessary to have returned along with the name of the taxable inhabitant, the various kinds and amount of the property in respect of which he was to be taxed. This, and not an intention to lay the tax specifically on the property, except in the case of unseated lands, was the object in having any thing returned besides the name of the person to be taxed. The tax can no more be said to be laid specifically on the land than on the personal property returned; and if both real and per-

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sonal were specifically taxed, each would necessarily be respectively liable in the hands of the owner only for what was a charge on it: yet the whole of the personal property may be distrained, as well for what is assessed on the land, as what is assessed on it particularly, because the whole is one charge. There is then no reason to say there is a lien on the land, more than on the chattels returned: and with respect to them, the existence of a lien has never been pretended.

But other provisions of this act and of subsequent acts conclusively show that the legislature never thought of creating a lien. By the 15th section of the original act, the remedy is by distress; or if personal property cannot be found, by commitment of the body: and by the 16th section, the collector is to act in the matter at his peril; for if he fail to pay the whole amount of his duplicate within three months after it has been put into his hands, he is to be charged with the balance unpaid, a transcript of which being filed in the prothontary's office of the proper county, is to have the effect of a judgment. And further: by the 18th and 19th sections, the treasurer is required to issue his warrant commanding the sheriff to seize the body and estate of such delinquent collector, on the return of which the commissioners are authorised to issue their warrant commanding the property to be sold. From this it is plain the intention was that the commissioners should look to the collector alone, the whole amount of the taxes, with the exception of allowances for mistakes and insolvencies, being considered, at the end of three months from his receipt of the corrected duplicates, as actually in his hands. In this respect, therefore, the commissioners have nothing to do with the person or property of the taxable inhabitant, the collection being a matter exclusively between him and the collector, who alone is liable to the county. There can be no outstanding taxes but in the hands of the collectors; and we accordingly find the practice to credit them as such on the treasurer's books, is universal. The remedy against the collector is not in addition to a supposed remedy against the person or property of the taxable inhabitant; for by the supplementary act of the 2d of *April*, 1821, it was provided, that wherever the collector had failed to collect the taxes within the time prescribed, he might maintain an action in his own name; thus giving him a personal remedy for unpaid taxes as for his proper debt: which is inconsistent with the notion that the commissioners have a direct claim against the taxable inhabitant, and that their remedy against the collector is cumulative. If they ever had such a claim it was transferred by this act; but the truth is they never had. The act was passed for equitable reasons; to restore to the collector, authority to use compulsory means, which he had lost by indulgence beyond the period when all authority to proceed under his warrant, had ceased. Under this act therefore he collected the tax as a debt due not to the county, but to himself, and of which he had become the owner by substituting his own lia-

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bility for that of the debtor. This act is repealed by the supplementary act of the 11th *March*, 1822, which authorises the collectors to proceed under their respective warrants at any time within three years from the date; but without in any respect impairing the effect of the 16th and 18th sections of the act of 1799, which fix the collectors for the amount of their respective duplicates to the county.

The selling of lands for the trifling amount of taxes usually due on them, is always attended with inconvenience and vexation to the owners, who are often involved in trouble and expense, by the sheer neglect of the collectors, who seldom make a personal demand. This, and not the amount to be paid, has been the cause of the repugnance constantly evinced to acts of congress laying a land tax, which have always contained a provision for the sale of land itself, in default of payment. Our state legislature, on the contrary, have ever been guided by the wise policy of not looking to the land, in that class of cases which necessarily affords a reasonable probability of obtaining the tax from the person or chattels of the owner. They seem to have supposed, that on every tract in actual occupancy, sufficient personal property would be found, to satisfy the demand by distress; and the very few instances in which this might not be the case, were thought too unimportant to merit special provision. By the act of the 3d of *April*, 1804, tenants in possession are made liable, just as if they were the owners of the land, with an optional right of recovery, against their landlords, or of defalcation out of the rent. Before this time, the laws were founded on a supposition, for the most part true, that the owners of improved lands, resided on them, and in that case, the taxes could be obtained by the use of due diligence, from their persons or property. Since this act, however, nothing can be lost, except in cases of absolute insolvency; and the collector will be entitled to an allowance on that ground.

It is remarkable that the person and the land are never both charged for money due in respect of the land. Purchase money due the state is a charge on the land itself and not on the person of the grantee; and taxes on unseated lands, have never I believe been considered a charge on the person of the owner, who may abandon them whenever they are not worth the taxes. There is no other means of obtaining taxes due on these, than a sale under the act of assembly. In the case of seated lands, there is no other means than distress of the owner, or occupant's chattels, or commitment of the body. If the legislature had intended to create a lien, they would have provided some direct means of enforcing it; and the inference from the want of such a provision, is irresistible. It is altogether incredible, that they would have trusted to the uncertain and improbable event of the land being at some period, sold by the Sheriff, and of the purchase money being brought into court for distribution; in which case, only, the lien would be availing. A lien without retention of possession, or any other means of rendering it produc-

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tive, is altogether so worthless, as to preclude all idea of its having ever been in the contemplation of any one.

I am therefore of opinion, that the plaintiffs have leave to take the money claimed by the collector, out of court.

Judgment that the plaintiff have leave to take out of court the money which was claimed for taxes.

[PHILADELPHIA, DEC. 23d, 1822.]

WALN *against* THOMPSON.

A valued policy of insurance was made of supposed profits, on a cargo of goods, on a voyage from *Canton* to *Philadelphia*, free from average, and without benefit of salvage. The ship sailed from *Canton* with a cargo, but in consequence of bad weather, put into the *Isle of France* for repairs; part of the cargo was so much damaged, that it was thrown overboard; part being also damaged, was sold, and the proceeds reinvested, and these, with the sound part, arrived at *Philadelphia*, where it was found that part of those considered sound, were damaged. The sound teas were sold at a very considerable profit, but on the whole cargo there was no profit: and there was a loss of more than fifty per cent. on the whole goods shipped. *Held*, that the underwriter was discharged.

THIS was an action on a policy of insurance, brought by *William Waln* against *Edward Thompson*, and was tried before DUNCAN J., at *Nisi Prius*, when a verdict was taken for the plaintiff, subject to the opinion of the Court.

The policy was declared to be, "on supposed profits on a cargo of goods in the ship *Bengal*, on a voyage from *Canton* to *Philadelphia*—warranted free from average, and without benefit of salvage. Amount valued at 20,000 dollars." The ship sailed from *Canton* the 25th *December*, 1815, with a cargo of teas, cassia, china, &c. On the 27th *January*, 1816, she met with a gale of wind, by which she suffered considerable damage, in consequence of which, she put into the *Isle of France* for repairs. On a survey, the whole cargo being unloaded, part of the teas was found so much damaged, that it was ordered to be thrown into the sea. Another part being damaged, and in a perishable state, was sold for the benefit of the concerned, and the proceeds invested in other goods, which, with the sound part of the cargo, were shipped on board the *Bengal*, who, after receiving the necessary repairs, resumed her voyage to *Philadelphia*, on the 9th *April*, 1816, and arrived there the 1st *July* following. At *Philadelphia*, it was found, that part of the teas taken on board at the *Isle of France*, as sound, was in fact, damaged at that time. The sound teas were sold at *Philadelphia*, at a very considerable profit, but upon the whole cargo there was *no profit*, and there was a loss of more than fifty per cent. on the whole amount of the goods shipped at *Canton*. The plaintiff abandoned, and claimed for a total loss.

(Wald v. Thompson.)

J. R. Ingersoll and *C. I. Ingersoll*, for the plaintiff.

The question is, whether there was not in this case a total loss of profits, occasioned by perils of the sea, within the meaning of the policy; and of the warranty. There may be an average loss in an insurance upon profits, as well as upon other subjects of insurance, *Abbott v. Sebor*, 3 *Johns. Cas.* 39; but if there be nothing else in the case, the claim is precluded by the warranty. There must be a total loss, or the plaintiff cannot recover. We contend, that there was such a total loss. There was no profit whatever derived by the plaintiff from the cargo shipped: so that it was, in fact, to him, a total loss of profits. The literal meaning of the memorandum is, that if any profit is made, though less than 20,000 dollars, the underwriter is discharged: there shall be no average. But if there be no profit whatever, the loss is total, *provided always*, that the loss is occasioned by a peril insured against. No other sensible meaning can be given to this policy; there can be no salvage, for there is nothing to abandon when there is no profit. A more liberal interpretation may be given; that if the goods arrive in safety, although no profits be made, the underwriter is discharged. But where all the goods shipped do not arrive, and the profit that would have been made is thereby sunk, the underwriter becomes responsible.

An insurance of profits on goods, partakes of the character of an insurance on goods: and the rule is well settled, that if the damage amounts to fifty per cent., or more, it is not an average, but a total loss. *Gardiner v. Smith*, 1 *Johns. Cas.* 141. In the present case the fact is admitted in the argument, that there was a loss of more than fifty per cent. on the goods shipped at *Canton*: so that it falls within the general rule. If less than one half the goods had been lost, it would then have been a case of average, and the warranty would have barred the plaintiffs claim. If nothing is a total loss under this policy, but an absolute actual loss of the whole cargo, then the safety of a single article would defeat the plaintiffs recovery. In *Abbott v. Sebor*, 3 *Johns. Cas.* 39, *KENT*, C. J. seems to think, though he does not expressly decide the point, that the usual rule as to ship and cargo, of a loss of more or less than one half the subject, is the criterion applicable to profits, in determining whether it is a total or average loss.

In policies on corn, and other perishable articles, it is usual to introduce a memorandum, warranting them "free from average, unless general, or the ship be stranded;" and they are thence termed memorandum articles. It is true, the cases that have arisen on the words *free from average*, in these policies, have decided, that the underwriter is discharged, if there be not an actual total loss, though the loss exceed fifty per cent, *Wilson v. Smith*, 3 *Burr.* 1550. *Mason v. Skurry*, *Condys Marsh.* 226. *Cocking v. Fraser*, *Ib.* 227. *Dyson v. Rowcroft*, 3 *Bos. & Pull.* 474. *Marcadier v. The Chesapeake Insurance Company*, 8 *Cranch.* 39. *Biays v. The Chesapeake Insurance Company*, 7 *Cranch.*

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415. *Moreen v. The United States Insurance Company*, 1 Wheat. 219. But the reason that governed the decision of these cases, does not apply in this. It was because the articles were easily deteriorated by various causes, and were of a perishable nature: whereas here they are of a different character, and it is not to be supposed, the parties intended to use the word average in the sense in which it is applied to memorandum articles, but in that in which it is used in construing insurances on ordinary goods, or vessels, namely, a loss under fifty per cent. To this point is the case of *Judah v. Randal*, 2 Caines' Cases in Error, 324. A chariot was insured to be carried on deck, among other perils, against jettison, and free from average: the box estimated at two thirds of the price of the whole, was thrown overboard in a storm: the insured may abandon for a total loss, as; by the loss of the box, the subject no longer remained in specie.

At all events, there was a total loss of part of this cargo, for which the plaintiff is entitled to recover. There was an entire destruction of some of the goods, and of course, of all profits that might have been made of them. In *Davy v. Milford*, 15 East. 559, there was a policy of insurance on flax, put up in different packages, with the warranty of free from average, unless general, &c. Some of the packages were sunk and totally lost: others were partially damaged. The court decided that the insured should recover for those which were totally lost. In *Hodgson v. Glover*, 6 East. 316, there was an insurance on the profits of a cargo of slaves. In consequence of tempests, which injured the ship, some of the slaves were lost: the rest arrived safe, and were sold, but on the whole, there were no profit. The plaintiff was not allowed to recover; but the reason of the court was, that he had not shewn, that if all had arrived, there would have been some profit.

A further ground of claim is, that by this policy the voyage from *Bengal* to *Philadelphia* was insured: but this voyage was not performed according to the intent of the policy, in consequence of perils insured against. The entirety of the voyage was broken. The ship and cargo did not arrive at *Philadelphia* when they ought to have arrived.

Binney and *Hopkinson* for the defendant. It is now well settled, that profits are an interest capable of being insured: though such insurances are in some countries forbidden by express ordinances. They stand on the same footing as policies on other interests, and may be subject to a total or partial loss. *Barclay v. Cousins*, 2 East. 544. The difficulty of the calculations that may arise, cannot affect the question of interest, or the legality of the contract. *Eyre v. Glover*, 16 East. 217. In *Hodgson v. Glover*, 6 East, 316, there was, on the whole, no profit from the slaves, yet the court considered it as an average loss; because it appeared that a part of the slaves got to the market, and might have yielded a profit for aught that appeared. In *Loomis and Tillinghast v.*

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Shaw, 2 *Johns. Cas.* 36, there was an insurance on the profits of goods on a voyage from *New-York* to *Havre*, and the plaintiff was allowed to recover only for an average loss on three eighths of the goods, though the ship was captured, having accepted five eighths of the goods, and appropriated them to his own use. In *Abbott v. Sebor*, 3 *Johns. Cas.* 39, it is expressly laid down by KENT, C. J., that considering a policy on profits as an interest policy, it follows, that there may be an average loss. With respect to what shall be the criterion of an average or total loss as to profits, he merely suggests, that, *perhaps*, the established rule, in respect to ship and cargo, of a loss of more or less than half the subject in value, may be applicable, but expressly waives the decision of it. It is said, in one case in *New-York*, *Mumford v. Hallet*, 1 *Johns.* 433, that an insurance on profits is *ex necessitate*, a valued policy. If so, it is a gambling policy, and then there can be no recovery for an average loss.

But the memorandum in this policy, warranting free from average, and without benefit of salvage, was introduced for the very purpose of preventing all questions about average and salvage. It is upon this memorandum the case must be decided: and the effect of it is, that the plaintiff can recover only on a loss total in its nature, not on a technical total loss, arising on a damage of more than fifty per cent. Throwing out of the question that part of the clause relative to salvage, the meaning of the part relative to average is to be ascertained. Average means any partial loss, whatever may be its extent. All damage, short of destruction, is average. The insured may consider it as average, though it exceed fifty per cent. "A partial loss," says *Sergeant Marshall*, "is any loss or damage, short of, or not amounting to a total loss. If a ship arrive, however great the injury done to her may be: if goods specifically remain, however damaged, unless they are rendered of no value, and altogether useless, it is a partial loss." "Partial losses are sometimes denominated *average losses*, &c." 2 *Condry's Marsh.* 486. In speaking of the right of abandoning, the same book quotes *Le Guidon*, where it is laid down, that the insured may abandon, where there is an *average loss* or damage, *which exceeds half the value of the goods insured*, &c. *Ib.* 563. Which shows that such loss is really an average loss in strict language, though at other times, called a technical total loss, if the insured choose so to consider it.

In *Fitzgerald v. Pole*, 5 *Br. Parl. Ca.* 131. *Willes* 641. *Cit.* 2 *Condry's Marsh.* 585, these words, free from average, were considered: and the House of Lords were of opinion, with the majority of the Judges, that the insured, being by the terms of the policy, free from all average, the plaintiff could not be entitled to recover, but in case of a total loss. In the case of perishable articles, these words have received a settled construction, that the insured cannot convert a partial into a total loss by election, and that a total loss can never happen, where the subject insured, or a part of it, has reached the original port of destination, though the loss sustained in the whole,

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exceeds fifty per cent. *Magrath v. Church*, 1 *Caines*, 196. *Nelson v. The Columbia Insurance Company*, 3 *Caine's*, 108. *Moreen v. The United States Insurance Company*, 1 *Wheat*. 219. *Biays v. The Chesapeake Insurance Company*, 7 *Cranch*. 415. *Anderson v. The Royal Exchange Assurance Company*. *Wilson v. The same*, 2 *Campb.* 623. *Thompson v. The same*, 16 *East*. 213. *Glennie v. The London Assurance Company*. 2 *Maule & Sel.* 371. In bottomry and respondentia, where there is no average, in the English law, nothing short of a total loss will discharge the borrower; the obligation remains, however the thing may be damaged by the perils of the sea. 2 *Marsh.* 754. Though in *Philadelphia*, by an express clause in the policy, the lender is liable to average. *Gibson v. The Philadelphia Insurance Company*, 1 *Binn.* 405. It is true, there is a difference in the articles embraced in this policy, and memorandum articles: but the parties may introduce what articles they please, and the construction must remain the same, without regard to the nature of the article. That construction has been so well settled, that it must be considered to have been in the view of the parties, in using similar language.

It is said there was a total loss of part of the cargo. The case of *Davy v. Milford*, 15 *East*. 559, sets up a new doctrine: but it is in direct contradiction to *Biays v. The Chesapeake Insurance Company*, 7 *Cranch*. 415; and *Moreen v. The United States Insurance Company*, 1 *Wheat*. 219. It is further alledged, that though some of the goods arrived safe, yet the voyage was lost. That temporary interruption is no loss of the voyage. *Manheim v. Newman*, 2 *Marsh.* 586. *Anderson v. Wallis*. 1 *Maule & Sel.* 240.

The opinion of the court was delivered by

TILGHMAN, C. J., (after stating the case). It was contended by the counsel for the plaintiff, in the first place, that there was a total loss of the voyage by the very great interruption, and delay, which took place, in consequence of the damage at sea, which obliged the ship to put into the *Isle of France*. But this argument is not sustainable—the *interruption* of a voyage, is not the *loss* of it. The insurers engage that the voyage shall be accomplished, but not in any particular time. The ship is to be repaired at their expense, and then to prosecute her voyage. She did so in this instance, and arrived safe at the port of destination. If it were necessary to cite authority on this point, I might refer to the case of *Anderson, &c. v. Wallis*, 2 *M. & S.* 240, which is much stronger than the one now under consideration. In that case, the voyage insured, was from *London* to *Quebec*, and the ship, having reached the banks of *Newfoundland*, was obliged to put back, and made a port in *Ireland*. There she was repaired, but the season was so far advanced, that the voyage to *Quebec* could not be prosecuted till the next

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year. Still it was held that the voyage was not lost. But the difficulty in the present case arises on the plaintiff's second point, which is, that the loss was total, because it exceeded fifty per cent. In general, that is the rule. If goods are damaged to the amount of more than fifty per cent. the insured may abandon, and claim for a total loss. But this is an insurance *on profits*, and by the express agreement, the defendant is to be *free from all average loss*, and to have no benefit of salvage. This is a very important part of the contract. The case turns on it. There can be but two kinds of loss; total and partial, (commonly called average). Every loss, less than total, must be partial, however great its amount. That kind of total loss which arises from damage, to an amount greater than fifty per cent., is merely technical. It is, in truth, as much a partial loss, as if the damage were only five per cent. And although the rule has been adopted for convenience, yet it is at the option of the assured, to wave it; he may abandon, and claim for a total loss, or decline an abandonment, and recover according to his actual loss, be it what it may. The question is then, whether, when the insured discharges the insurer from *all average loss*, he does not discharge him from all loss which may be properly called average, without regard to its amount. Although this is an insurance *on profits*, yet it partakes something of the nature of an insurance on the goods from which the profits are to arise. The profits are valued at 20,000 dollars. Yet it cannot be considered as an undertaking that the insured shall in all events make profits to that amount. If the cargo had arrived in good condition, at *Philadelphia*, the underwriters would have been discharged, though it had sold *at a loss*. In order, therefore, to ascertain the meaning of this expression, "*free from average*," it will be important to inquire whether it has been used, and acquired a definite signification, in insurances *upon goods*. And we find that it has. In almost every policy, the words "*free from average, except general*," are applied, in a memorandum, to certain articles, (thence called memorandum articles,) which by nature, are apt to be deteriorated from other causes, than perils of the sea. Concerning the meaning of those words, there have been frequent disputes. I shall mention some of the cases, from which it will appear, that it is now well settled, that although the memorandum articles are damaged to a greater amount than fifty per cent., the insurer is not liable, because the loss is but partial. In *Wilson v Smith* 3 Burr. 1550, the goods were damaged more than fifty per cent., yet the underwriters were held not liable. *Anderson v. The Royal Exchange Assurance Company*, (7 East. 38) was a stronger case; the ship was stranded, and the goods remained some time under water, during which the insured might have abandoned, because the loss was total; but having waited till they were recovered from the water, although very much damaged, and then abandoned. it was held that he was too late, and the insurer

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were discharged, because the loss though great, was but partial. The same law is to be found in 16 *East*. 214. *Thompson v. The Royal Assurance Company*, and in *Glamie v. The London Insurance Company*, (2 *M. & S.* 371,) and *Wilson v. The Royal Exchange Insurance Company*, (2 *Camp.* 623.) The courts of the *United States* have held the same principle as appears in *Marcadier v. The Chesapeake Insurance Company*, (8th *Cranch.* 39.) and in *Biays v. The Chesapeake Insurance Company* (7 *Cranch.* 415) also in *Moreen v. The United States Insurance Company*, (1 *Wheat.* 219.) From all these authorities, it is quite clear, that in an assurance on goods "*warranted free from average unless general*," the insured cannot recover for any partial loss, though exceeding fifty per cent. But this is an insurance *on profits*. When first this kind of insurance was introduced, its legality was questioned. But although it is in its nature productive of difficult questions, and therefore forbidden by the laws of several countries in *Europe*, yet its legality is not now to be questioned here, having been long ago firmly established. The disputes which spring from it, are not always easy to be comprehended; yet we may understand without difficulty that there may be a partial loss of *profits* by an *absolute loss* of *part* of the goods from which the profits were expected to arise, or from damage sustained by *part* of the goods or *all of them*. In the case of *Hodgson v. Glover*, (6 *East*. 316,) there was an insurance *on profits* of a cargo of slaves. The ship was injured by tempests, in which some of the slaves were lost, the rest arrived safe and were sold; but upon the whole there were no profits and the insured claimed for a total loss. The plaintiff did not recover, for a reason not applicable to the case before us, but both *Lawrence* and *Le Blanc*, Justices, in delivering their opinions, remarked, that it was clearly only an *average* loss. In this present case, the teas which arrived in good condition, were sold at great profit, although upon the whole adventure there was a loss. In that respect, it resembles the case of *Hodgson v. Glover*, and both cases are alike in another circumstance, viz. that the profits were *valued* at the sum insured. Taking for granted then, that whatever loss was suffered in the present case, was but *partial*, how is the plaintiff to recover against his warranty, *free from average*? And what reason can be assigned, for giving these words a different construction when applied to *profits*, from that which has been established when applied to *goods*? Ought we not rather to suppose, that the construction which had been applied to *goods*, long before insurances *on profits* were introduced, was understood by both parties, and intended to be adopted, when an insurance on profits was first made? In both instances the warranty in question appears to have been introduced, for the purpose of avoiding all dispute upon a subject capable of producing dispute, and that too of a difficult nature. I am therefore of opinion, that in both cases there should be the same construction.

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There was another question raised by the plaintiff's counsel, which remains to be considered. Some of the teas were *totally lost*. Is he entitled to recover for loss of profits on them? It is contended, that he should recover, because in such case, if the insurance had been on *goods*, he would have recovered. For this the case of *Davy v. Milford*, (15 *East*. 559) is relied on. That was an insurance on flax, put up in different packages, warranted free from average, except general. Some of the packages were sunk and totally lost; others were partially injured. The Court of King's Bench held, that for those which were totally lost, the insured was entitled to recover. This is the only English case in support of that position, and it is in direct contradiction to the case of *Biays v. The Chesapeake Insurance Company*, (7 *Cranch* 415.) That was an insurance on a cargo of hides, warranted free from average, except general. Some of the hides were sunk and totally lost, and the question was, whether the plaintiff could recover for them. The court, on full consideration, decided, that he could not recover; because those hides, being part of the cargo, the loss, on the whole, was but partial, although part was totally destroyed. The decisions of the Supreme Court of the *United States* have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one. Yet so great is the importance of preserving uniformity of commercial law, throughout the *United States*; and so great the respect which I feel for the highest tribunal in the union, that I shall always be inclined to adopt its opinions, rather than those of any foreign court, unless when I am well satisfied, it is in the wrong. That is more than I can say on the present occasion: for whoever examines the reports of the two cases I have referred to, will perceive, that the question underwent more discussion, and was decided after more deliberate consideration, in our own country, than in *England*. I think, it will be perceived, that the principle set up by the *English* court, although recommended at first view, by an appearance of equity, will have a tendency to introduce some of those very disputes, and difficulties, which it was the object of this warranty to prevent. Upon the whole, it is my opinion, that the plaintiff, having proved only an average loss, and having warranted against all average losses, is not entitled to recover.

[PHILADELPHIA, DEC. 30, 1822.]

SCOTT and others *against* MORRIS and another, assignees of HUMPHREYS and another.

CASE STATED.

If creditors release, under an assignment by the debtor in trust to pay their respective demands in full, the surplus to go to the debtor, and the fund prove sufficient to pay the whole debt and part of the interest up to the payment of the last dividend, they are entitled to receive such interest.

AN amicable action was entered by *Thomas Scott, George Trotter, and John Tilford*, against *George Morris and Benjamin Sharpnack*, assignees of *John Humphreys and Durdon B. Carter*, lately trading under the firm of *Humphreys and Carter*, and a case was stated for the opinion of the court.

In *March, 1817*; *Humphreys and Carter* made an assignment to *Morris and Sharpnack*, in trust. 1st. To pay all the persons to whom they were indebted for money lent, or by reason of the indorsement of their promissory notes, or by a loan or exchange of their notes for the accommodation of the said *Humphreys and Carter*, the amount of their respective demands in full. 2dly. To pay all other creditors of the said *Humphreys and Carter* the amount of their respective demands in full, if the monies remaining should be sufficient: but if not sufficient, then a rateable proportion of the monies remaining after the payment of the first class. 3dly. To pay the surplus, if any, to the said *Humphreys and Carter*, their executors, administrators, or assigns: provided, that no creditor or creditors should be entitled to any payment or dividend, unless he or they on or before the 2d *June, 1817*, executed a full and effectual release of his or their demands against *Humphreys and Carter*, and each of them. On the 12th *May, 1817*, the plaintiffs, and other creditors of the first class, executed releases conformably to the condition, and the assignees had paid them the entire principal of their debts, but declined paying any interest upon them, though they had in their hands sufficient funds to pay 43 per cent. of the interest, calculating up to the time of paying the last dividend. The question submitted to the court was, whether the assignees were bound to pay to these creditors the amount of interest in their hands.

Duane, for the plaintiffs. The provision in this assignment embraces the respective demands of the creditors in full, and these words include interest as well as principal. Interest follows the principal as a necessary consequence. The creditors released on condition of receiving their whole debts, and they would lose a part of what is due to them, if they should lose the interest. Nothing but an inadequacy of funds can subject them to this loss. If the creditors do not receive it, it must by the assignment return to the debtor. As between the debtor and the creditors, there can be

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no question, but the creditors are entitled to the amount of the interest.

Chauncey, contra, contended, that under the words requiring the assignees to pay "their respective demands in full" the creditors were not entitled to interest in the event that had happened. Demands, as used here signify demands at the date of the assignment. Besides, the plaintiffs have executed a release of all demands, by which their claim to interest is extinguished. The general rule in bankruptcy is for the commissioners to compute interest upon debts no lower than the date of the commission, because it is a dead fund: and there is no direction in the act for that purpose. *Cook's B. L.* 4th ed. 181. Interest is allowed on a note only where it specifically carries interest, *Ib.* 182. It is true where there is a surplus creditors are allowed interest from the date of the commission in preference to the bankrupt, *Ib.* 535. The Chancellor however possesses large equitable powers in bankruptcy, which this court would not pretend to exercise over the funds in the hands of assignees.

The opinion of the court was delivered by

TILGHMAN, C. J. This cause comes before us on a case stated to which I refer.

The trust, in the deed of assignment, under which the plaintiffs claim, is, that the defendants will in the first place, pay to the creditors of the first class (to which the plaintiffs belong) "*the amount of their respective demands in full.*" The word *demand* is very comprehensive. It includes every thing which the creditors would have been entitled to recover by suit. And there is no doubt, that interest might have been recovered, as well as principal. Consider the nature of the debts to which the first class was restricted; "debts due for money lent to *Humphreys* and *Carter*, or by reason of the indorsement of their promissory notes, or by a loan, or exchange of notes, for their accommodation." In all these cases the creditor would have had to pay his own money for the benefit of *Humphreys* and *Carter*, and nothing can be more reasonable than to allow him interest, from the time of payment. Consider also, what is to become of the *surplus* in the hands of the assignees, after the payment of all demands. It is to go to *Humphreys* and *Carter*. Now surely, it could not have been intended, that the creditors should lose their interest, and the debtor put the money in his pocket. It does not appear, in the state of the case, of what the fund in the hands of the defendants consisted. But it is hardly possible, that it should have been altogether a dead fund. Probably it consisted, in part at least, of outstanding debts, which would carry interest. And if so, it would make the injustice of the debtor's pocketing the surplus, the more glaring. There is not a perfect analogy between the case before us and that of commissioners of Bankrupt. For, although the statutes of bankruptcy, may not contain any express provisions respecting the payment of in-

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terest, yet the chancellor exercises larger equitable powers, than this court would venture to assume. I think it safer to put the case on the words of trust contained in the deed of assignment. These words on a fair construction, include interest, and therefore the creditors are entitled to interest. It was remarked by the counsel for the defendants, that the plaintiffs had executed a release, by which their claim of interest was extinguished. But the same agreement would prove that the principal also was extinguished. And so, in truth it is as regards *the debtor*. The plaintiffs could no longer support an action against him for the principal. But they have a good claim *under the assignment*, and then the question is, to how much are they entitled; which brings the point at last, to the construction of the deed, on which I have already expressed my sentiments. On the whole then, I am of opinion, that the plaintiffs are entitled to interest up to the time of the payment of the last dividend.

[PHILADELPHIA, DEC. 30, 1822.]

LEVY *against* PETERS and another Executors of SPROGELL.

IN ERROR.

Payment of part of a check by the drawer, after it becomes due, dispenses with the necessity of proving a demand on the bank, in a suit against him.

So, it seems, would a payment of part, before the check becomes due.

The plaintiff cannot, by voluntarily giving credit for a part payment, evade the necessity of proving a demand on the drawee, if the defendant disclaims such credit, and insists on the want of a demand. But if the defendant acquiesces in such credit, and insists that the whole has been paid, and relies on length of time, and other circumstances, to discharge him altogether, he thereby admits a part payment.

On a writ of error to the Court of Common Pleas of the County of *Philadelphia*, in assumpsit, brought by *Joseph Levy* against *Richard Peters*, and *Betsy K. Sprogell*, executors of *David Sprogell* deceased, a bill of exceptions was returned, which stated, that on the trial, the plaintiff gave in evidence a check for 400 dollars, drawn by the testator on the Mechanics' Bank, in favour of the plaintiff, dated the 12th *June*, 1815, on which he claimed as due, a balance of 50 dollars, with interest from the date thereof, giving credit for the 350 dollars, which he said had been paid by the defendants testator in his life time. The defendants insisted, that the check had been wholly paid, and had been cancelled by the said testator, or some person who had it; and gave evidence to prove that it had been cancelled. The defendants then insisted, that the said evidence so exhibited by them, together with the great length of time that had elapsed since the date of the check, were

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sufficient to entitle the defendants to the verdict of the jury, and to go acquitted and discharged. And the plaintiff then and there insisted, that the said evidence, as given, was insufficient to entitle the defendants to the verdict of the Jury, but that the plaintiff was entitled to recover.

The President of the court delivered the opinion of the court to the jury as follows, to wit: "That the jury must judge as a matter of fact, whether the check had been cancelled, and of the other questions of fact arising in the cause; but that the plaintiff could not recover, because he had not proved a demand upon the bank on which the said check was drawn. That there was no evidence of the payment of 350 dollars in part of the amount; and if there had been, it would not have altered the case in this respect; a check on the bank being in the nature of an inland bill of exchange, and subject to all the rules which regulate the negotiation of such an instrument." The jury gave their verdict for the defendants. Whereupon the plaintiff excepted to the opinion of the said court.

E. S. Sergeant and *Phillips*, for the plaintiff in error, now contended, that the court below had charged the jury erroneously. They informed the jury, that a demand on the bank was indispensable, to enable the plaintiff to recover; whereas payment of part by the drawer, dispenses with the necessity of making a demand. Either want of funds in the hands of the drawee, a payment in part by the drawer, or an acknowledgment of the debt, and a promise to furnish funds for the balance, dispenses with the necessity of a protest and notice, in the case of a bill of exchange, or promissory note. *Read v. Wilkinson*, *Cir. Court, Whart. Dig.* 87. It would have been fruitless to present the check at bank, in order to receive 50 dollars upon it. No bank would pay a portion of the amount of a check. The court, however, say, that there was no evidence of the payment of the 350 dollars, in part of the amount. Yet this was a fact admitted on both sides. The plaintiff stated it explicitly, and demanded only the balance: the defendants insisted, that the check had been *wholly* paid, and relied upon the evidence they had given of that fact, and on the length of time to excuse them. They never pretended to disclaim the credit given by the plaintiff, and the court below ought to have considered that as a fact admitted on both sides. The court go still further, and say, that even part payment would not have altered the case: in which there is manifestly error, because, even in the case of bills of exchange, to which the court assimilate the check, the rule is well settled, that part payment dispenses with the proof of a demand on the drawee: since it is an admission by the drawer of his liability to pay.

Peters contra. The plaintiff gave no evidence but the check. He credited the defendants with 350 dollars: but of this they knew nothing: they were not bound to deny or admit it, nor called upon to do so. Surely the plaintiff, by voluntarily giving a credit for

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part payment of a check, or bill of exchange, cannot exempt himself from the necessity of proving a demand on the drawee, and notice to the drawer. Otherwise, the rules established for the security of parties to commercial instruments, may be easily evaded. But, supposing there was a part payment, we contend, that the court was right in saying, that a demand on the bank was necessary. It is always necessary, unless it be proved, that the drawer had no funds there.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action on a check for 400 dollars, drawn by the defendants' testator, *Edward Sprogell*, on the Mechanics' Bank, payable to the plaintiff. On the trial, in the court below, the plaintiff gave credit for 350 dollars, which he said, was paid by *Edward Sprogell*, and demanded only the balance of 50 dollars, with interest thereon. The defendants insisted, that the whole had been paid by the testator, and that the check had been cancelled. The president of the court submitted to the jury, the fact of payment, but remarked, "that there was no evidence of the payment of 350 dollars in part, of the amount, and if there had been, it would not have altered the case, in this respect; a check on the bank, being in the nature of an inland bill of exchange, and subject to all the rules which regulate the negotiation of such an instrument."

If the defendants had put their case on the necessity of a demand of payment from the bank, before the drawer could be resorted to, and had disclaimed the payment of any part by their testator, the court might then, with great propriety, have charged the jury, that as no payment was proved, and no demand proved, the plaintiff could not recover. It would not be sufficient for the plaintiff to give credit for part—he should prove it. For if the bare giving credit, were sufficient, the holder of a bill, who had been guilty of laches, might always get over it, by giving credit for a small payment. But this cause appears to have taken a different course. For the defendants alledged, that the *whole* had been paid; and their counsel requested the court to charge the jury, that payment should be presumed from length of time, and other circumstances. The jury might well have supposed, from the conduct of the defendants that they admitted the credit given by the plaintiff. Indeed, the plaintiff himself, might have been induced to suppose so, and therefore have omitted the production of evidence of payment. The question will be then, whether the court was right in its opinion, that even supposing payment of part to be proved, the plaintiff could not recover, because he had not proved a demand of the bank. In general, there cannot be a recovery, without proof of a demand, and notice to the drawer, that payment has been refused. But there are exceptions to this general rule. Whenever the drawer acknowledges himself to be liable to pay-

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ment, the necessity of proving a demand of the drawee, and his refusal to pay, and notice to the drawer, is dispensed with. Because such acknowledgment carries with it internal evidence, that the drawer knew, that due diligence had been used by the holder, or even if it had not, that still the drawer confessed he was under an obligation to pay. And it is immaterial, whether there be proof of an express promise to pay, or of other circumstances from which it may be inferred, that the drawer acknowledged himself liable. And I take it, that payment of part, is such a circumstance. It was so said, by Judge *Washington*, in the case of *Read v. Wilkinson*, cited in *Whart. Dig.* 87, from a M. S. report. And there is good reason for it. For why should part be paid, unless the payer acknowledged the obligation of paying the whole. I am speaking now, of payment of part, after a bill has become due. It does not appear, by the bill of exceptions in this case, at what time the part payment was credited. But if one draws a check on a bank, payable some time after date, and before the time of payment, the drawer pays part, I should suppose it must be the intent of the parties, that the check should not be presented. I doubt whether the bank would pay the balance in such case, without a special order from the drawer, or some written explanation. On this point, however, I give no positive opinion, as the case does not require it. But I am of opinion, that there was error in that part of the court's charge, in which it was said, that supposing the payment of part of the check to have been proved, still the plaintiff was not entitled to recover, because he had not proved a demand of the bank on which it was drawn. The judgment is therefore to be reversed, and a *venire de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

[PHILADELPHIA, DEC. 30, 1822.]

FRIES *against* BOISSELET.

IN ERROR.

Defendant being arrested on a note, said that he owed the plaintiff the money and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps he would keep him out of it as long as he could. Held that this was not such an acknowledgment as would take the case out of the statute of limitations.

ERROR to the Court of Common Pleas of *Philadelphia* county, in which judgment was rendered for the defendant, and the opinion of the President of the court was filed at the request of the plaintiff. The suit was originally brought before *John Geyer*, Esquire, one of the aldermen of the city of *Philadelphia*, who

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rendered judgment for the plaintiff, and the defendant appealed to the Court of Common Pleas.

The action was brought on a promissory note, dated the 12th October, 1811, drawn by *Eugene Boisselet*, the defendant, in favour of *John Fries*, the plaintiff, for the sum of 60 dollars, no time being limited for the payment. The plaintiff commenced his action before the magistrate, in July, 1819, and the defendant, on being arrested by the constable, said, that "he owed the plaintiff the money, and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he would keep him out of it as long as he could." The defendant pleaded the statute of limitations before the magistrate. In the court below issue was joined on the statute of limitations, and the president of the court charged the jury, that there was not sufficient evidence of such acknowledgment or promise as would take the case out of the statute, and that their verdict should be for the defendant.

Kittera, for the plaintiff in error, contended, that the acknowledgment by the defendant was sufficient to take the case out of the statute of limitations. The slightest acknowledgment is sufficient for that purpose, without a new promise, and from such acknowledgment the law infers a promise. The statute is not considered as extinguishing the debt, which remains binding in equity and conscience. It merely affects the remedy, which is revived by an admission of the obligation to pay, 5 Burr. 2630. That a bare acknowledgment of the debt within six years prior to the action, is sufficient to revive it, and prevent the statute, though no new promise was made, was held by all the judges. Carth. 470. 4 Bac. Ab. 483, E. 8. In *Jones v. Moore*, 5 Binn. 579, a letter written by the defendant, in which were contained these expressions, "I expect to be in the city in a few days, and will settle the matter," was held to revive the debt. The introduction of qualifying words will not invalidate the admission, unless they amount to an assertion that the debt is paid. In *Cowp.* 589, it is said by Lord MANSFIELD, that the words, "I am ready to account, but nothing is due to you," are sufficient to take the case out of the statute, if any thing is proved to be due. In *Moody v. Miles*, 3 Serg. & Rawle, 211, the last reported case on this subject, which has occurred in this state, the defendant said, on being arrested by the sheriff, "I will write to Mr. *Watts* to attend to the business. *Moody* did not do the business accurately." Yet these words were held to be a sufficient acknowledgment to revive the debt, though there was no promise to pay, but the defendant protested in a certain degree against the validity of the plaintiff's claim. In *Cobham v. Moseley*, 2 Hayw. 6, the expressions were "I will not pay it. *Rosewell* ought to pay it. I will speak to him about it." Yet they were held sufficient to charge the defendant after the six years had elapsed. The expressions of the defendant in the present case, that he

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would keep the plaintiff out of the debt as long as he could, meant that he would pay, but he would delay payment by protracting the suit as long as he was able. He further insisted, that the president was bound to leave to the jury the sufficiency of the evidence to take the case out of the statute, as it was a matter for their consideration, whether there was a new promise, or an acknowledgment: and that it was error to charge the jury peremptorily, that they must find for the defendant. He cited on this point, *Fisher's Executors v. Duncan*, 1 Hen. & Munf. 563.

King and T. Sergeant, contra, urged, that to take the case out of the statute, there must be either an express promise to pay after the six years, or an acknowledgment from which a promise may be inferred. A promise may be inferred from a simple acknowledgment without qualification: but it is impossible for a jury to infer a promise when the party, in the same breath in which he admits the debt, declares that he will not pay it. When the defendant declared that he would keep the plaintiff out of the debt as long as he could, he meant that he would keep him out of it as long as the law allowed him: that he would employ every legal protection to shield him against the demand: or, in other words, that he would take advantage of the lapse of time, and plead the statute. And accordingly, as soon as he appeared before the magistrate, the defence he made was, that the debt was barred by the statute. Some decisions have gone a great way; but of late courts have shown a strong inclination to retrace their steps on this subject, and to enforce a statute which is highly beneficial in its effects. *Clementson v. Williams*, 8 Cranch. 72. In *Jones v. Moore*, there were no negative or qualifying words, and the Chief Justice relies on the circumstance of the plaintiff's recognizing it as an existing debt. YEATES, J. explicitly holds, that where the party accompanies the acknowledgment with a declaration, that he means to insist on the benefit of the statute, no promise to pay can be implied, and it has been so decided by Judge WASHINGTON, in *Reed v. Wilkinson*, 2 Brown's Rep. 15 appendix, and also by the District Court of the city and county, in *Geyer v. Pearce*, 2 Bro. 35. The cases of *Bell v. Rowland's Administrators*, *Hardin's Kent. Rep.* 301. *Brown v. Campbell*, 1 Serg. & Rawle, 175, *Miles v. Moodie*, 3 Serg. & Rawle, 211, and the recent case of *Sands v. Gelston*, 15 Johns. 511, where the point is very fully considered and decided by the Supreme Court of New York, all concur to show, that where the acknowledgment is qualified by any expressions or circumstances which evince that the party is not willing to pay the debt, there the law will not raise a promise or revive the debt. As to the objection that the evidence ought to have been left to the jury, the distinction is this: where there is any thing ambiguous in the language, where it refers to extrinsic circumstances of a doubtful character, it may be proper to leave it to the jury. As in *Miles v. Moodie*, when it was uncertain in what character Mr. Watts

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stood, and why the defendant meant to write to him. But where all is plain and unambiguous, the construction is matter of law, and the party has a right to an explicit direction on the law to the jury.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action on a promissory note drawn by the defendant, payable to the plaintiff. Six years having elapsed, in consequence of which a recovery was barred by the act of limitations, the plaintiff commenced his action, and the defendant after he was arrested, said, "that he owed the plaintiff the money, and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken those steps he would keep him out of it as long as he could." The defendant pleaded the statute of limitations, on which issue was joined in the Court of Common Pleas, and the president in his charge to the jury, directed them, that the words spoken by the defendant were not sufficient to avoid the force of the statute.

It would be a laborious and unprofitable task, to examine all the cases which have been decided, on the statute of limitations. It is sufficient to say, it has been pretty well settled, that the bare acknowledgment of the debt, within six years, without an express promise to pay it, would be evidence from which the jury might presume a new promise. The case of *Cowan v. McGowan*, in the Circuit Court of the *United States*, *Wall. Rep.* went thus far, and this I think, was the *ne plus ultra* of the *Pennsylvania* decisions. In *England* the law was carried further, in favour of the creditor. It was held in *Bryan v. Horseman*, 4 *East*. 599, that the debt was revived by the following expressions: "I do not consider myself as owing Mr. *Bryan* a farthing, it being more than six years since I contracted. I have had the wheat, I acknowledge, and I have paid some part of it, and £26 remains due." It is plain enough, from the report of this case, that had it been *res integra*, the court of King's Bench would have decided differently. But they found themselves embarrassed by precedents from which they would not depart. But our courts, being under no such embarrassment, have put the law on a more rational footing; for it certainly is not rational, to infer a promise from words which negative a promise. The principle which I consider as now established with us, is, that the acknowledgment of the debt is sufficient evidence to infer a promise to pay, unless it be accompanied with words inconsistent with a promise. The case of *Murray v. Tilly*, was tried before me at *Nisi Prius* in the year 1811. It has not been reported, because it was not moved in bank. But I have examined my notes, and find that it was as follows. It was an action on a promissory note, drawn by *Tilly*, payable to *James Prince*, and by him indorsed, of which the plaintiff was the holder. After the lapse of six years, demand of payment being made of *Tilly*, he answered, "that if the note had been presented to him in time, he would have

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paid it, but that he knew, the statute of limitations would now bar the claim, and he would not pay it." In the course of conversation, *Tilly* acknowledged the note to be genuine, that it was signed by him, and had never been paid. But he added, "that it was drawn for the accommodation of *Prince*, and if it had been presented earlier, he might have had an opportunity of getting payment from him." The counsel for the plaintiff (*Mr. Chauncey*) urged the cases of *Cowan v. McGowan*, and *Bryan v. Horseman*. I will briefly give the substance of my charge to the jury, as it contains the sentiments I have held ever since. "The defendant acknowledged his signature, and that the note had not been paid, but declared, that he knew the debt was barred by the act of limitations, and that he would not pay it. The case of *Cowan v. McGowan* was fully considered by the judges who decided it, (of whom I was one) and established the principle, that an acknowledgment of an existing debt, was sufficient evidence of a new promise. This was going far enough, and farther than I should have gone, if the matter had been *new*. But the case before us, is different. Taking the defendant's confession altogether, he *negated a promise* by declaring *that he would not pay*. To call this evidence of a promise, appears to me to be contrary to common sense. No case has gone so far. *Bryan v. Horseman* is the nearest to it, but that is no authority here. In that case the court plainly intimated, that the law was settled in *England* contrary to their opinion of the true construction of the statute. If it has been so settled *there*, it was sufficient to justify their decision; but no such matter having been decided *here*, I am of opinion, that where a man, as in the present case, declares *that he will not pay the debt because it is barred by the statute, the jury ought not to presume a new promise*. The jury found for the defendant, and their verdict was acquiesced in. I do not know that this case has been contradicted. On the contrary, I believe the current of opinion has run with it, both in this and other states. In *Reed v. Wilkinson*, 2 *Brown's Rep.* 15 *Appendix*, it was held by the Circuit Court of the *United States*, for this district, that words of acknowledgment, accompanied by expressions tending to qualify them, should be taken altogether, and would not amount to a promise to pay. In *Wistar's Executors v. Moore*, 5 *Binn.* 579, it was said by YEATES, Judge, "that when the debtor expressed an intent to plead the statute, no promise could be inferred from an acknowledgment of the debt." The same principle was supported by the Court of Appeals of *Kentucky*, in *Bell v. Rowland's Administrators*, *Hardin's Rep.* 301. In *Brown v. Campbell*, 1 *S. & R.* 176, it was said by the court, that where the defendant did not deny, that the debt remained unpaid, but asserted that he never was liable for it, a promise could be inferred. In *Clementson v. Williams*, 8 *Cranch.* 72, it was said by MARSHALL, C. J. "that the decisions on the statute of limitations had gone full as far as they ought to be carried, and the court was not inclined to

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extend them," and the decision in that case was, that to take a case out of the statute, it was not sufficient to acknowledge within six years that the debt *had ever existed*; the acknowledgment must be, that it still existed. The last case which I shall mention, is *Sands v. Gelston*, 15 Johns. 511. The opinion of the court was delivered by SPENCER, C. J. who examined the different cases, and reasoned on the subject with his usual discernment and accuracy. His conclusion on the whole was, "that the acknowledgment of the existence of a debt within six years before the suit was brought, is evidence of a promise to pay the debt; but if such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence sufficient to revive the debt, and take it out of the statute." This is the true principle. It accords with reason and may now be considered as established by abundant authority. Let us apply it then, as a test, to the case before us. The defendant acknowledged that he owed the money, and would have paid it, if he had not been treated in an ungentlemanly manner. But having been so treated, he declared that he would keep the plaintiff out of it as long as he could. Taking the defendant's words altogether, they amounted to this—that he would not pay until compelled by law. Now this certainly is quite inconsistent with a promise to pay, and therefore no promise could be presumed.

I am of opinion, that there was no error in the charge of the court, and the judgment should be affirmed.

Judgment affirmed.

[PHILADELPHIA, DEC. 30th, 1822.]

FLINTHAM appellant *against* FORSYTHE and wife, appellees.

SAME *against* L'AMY and wife, appellees.

APPEAL.

It seems the Orphans Court cannot decree the payment of a distributive share, admitted by the administrator to be in his hands, where his accounts are filed in the Register's Office, and not brought into the Orphan's Court.

But where the accounts of an administrator are brought into the Orphan's Court, it may decree payment of a distributive share to one heir, where there is no dispute between him and the administrator as to the balance due him, though the accounts are, on the application of other heirs, depending before auditors.

The Orphan's Court cannot decree payment by an administrator, of the costs recovered in a suit brought against him by an heir in a court of common law, to recover his distributive share.

THESE cases came up upon appeal from the Orphans' Court of the City and County of *Philadelphia*. The appellees, on the 5th March, 1821, presented a joint petition to the Orphans' Court, claiming, respectively, distributive shares of the estate of *Elizabeth Febiger*, deceased, and setting forth, that *William Flintham*,

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the appellant, administered thereto, and had settled his accounts in the Register's Office, by which he admitted a balance in his hands, to be distributed according to law. That the petitioners had brought suits in the District Court, for the City and County of *Philadelphia*, against *Flintham*, for the recovery of their distributive shares, and had respectively obtained judgments, on the 14th *December*, 1820, for the sum of 1466 dollars, and 33 cents, which remained unpaid. And praying the court to issue citations to the said *Flintham*, to appear and shew cause, why the Orphans' Court should not decree him to pay over the sums they were entitled to, as heirs of the said *E. Febiger*, The Orphans' Court directed citations to issue, according to the prayer of the petition; and on the 17th *April*, 1821, after hearing, made a decree in favour of each of the petitioners, that the appellant should pay the sum of 1466 dollars, and 33 cents, with interest from the 14th *December*, 1820, and 26 dollars and 50 cents, costs of suit in the District Court, and also, the costs incurred by the decree.

Bradford, for the appellant, contended, that the Orphans' Court had no jurisdiction over the case, and that their decree was, therefore, void. It appears by the petition, that the accounts of the appellant were settled in the Register's Office: there is no reason to believe that they ever were in the Orphans' Court. The Orphans' Court cannot make a decree respecting accounts filed in the Register's office, never brought into the Orphans Court, nor before them. They had full power under the first section of the act of *March 27th*, 1813, *Purd. Dig.* 490, to cause the Register to transmit the accounts into the Orphans Court, or to compel the administrator to exhibit them: but neither of these proceedings has been adopted by the appellees. As to the judgments in the District Court, they are no foundation for the Orphans Court to proceed upon. They are not authorized to carry into effect, the judgments of a common law court. The proper mode to enforce them, is to take out executions there.

Ewing, for the appellees, stated, that their reason for proceeding in the Orphans Court was, that on obtaining an order to sell *E. Febiger's* real estate, in *January*, 1819, the appellant and *T. Bradford*, as his surety, gave a bond, with condition to pay over the proceeds in such manner as the Orphans' Court should decree, and owing to the insolvency of the appellant, their object was to resort to the surety for the amount recovered. He alleged that the accounts of *Mr. Flintham* had been in the Orphans' Court; that auditors had been appointed to settle them, that they had stated an account, and returned it to the Orphans' Court, before the decrees in these cases were made, and suggesting diminution of the record, prayed the court to award a *certiorari*, to cause them to be returned.

The court therefore awarded a *certiorari* to the Orphans' Court.

On the return of the *certiorari*, sundry papers were sent up with

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it, among which, were the accounts suggested by the counsel for the appellees. It now appeared, that the accounts of the appellant as administrator of *E. Febiger*, came before the Orphans' Court, and were confirmed *nisi*, on the 19th *March*, 1821. But on the 22d of the same month, they were referred to auditors, appointed by the court, on the petition of the heirs of Capt. *Carson*, who had been entitled to one of the distributive shares; and that the accounts were before the auditors at the time of the decree of the Orphans' Court above mentioned. On the 18th *May*, 1821, the auditors made a report, which was filed in the Orphans' Court, on which, that court decreed a larger sum to the heirs of Capt. *Carson*, than had been decreed to the appellees. The appellees, however, made no objection to the accounts, as originally settled by the appellant, but acquiesced; and it appeared, that all parties were content with *Mr. Flintham's* settlement, except the heirs of Capt. *Carson*.

Bradford, now relinquished his original objection, but insisted that the decree was invalid, because, at the time that it took place, the accounts were before auditors, and it was out of the power of the court to act upon them, till they had been reported. The accounts had been confirmed *nisi*: and when objections were made on the part of one of the heirs, the whole confirmation was cancelled, and the accounts were removed from the controul of the court, into the custody and power of the auditors. They could not be at the same time before the court, and another tribunal possessing a distinct jurisdiction. Besides, the Orphans' Court are empowered by law, to make only one decree, ascertaining the sum to be distributed. The first section of the act of 19th *April*, 1794, *Purd. Dig.* 288, provides, that "they are to order, and make just and equal distribution of *what remaineth clear*," after payment of debts and expenses. This must be by one decree, embracing all the heirs; not by separate decrees, for separate sums. Neither have they power to order the payment of costs recovered in a court of common law. That is a charge for which, the only remedy for the plaintiff is, by process out of the court in which judgment has been recovered.

Ewing for the appellees, answered, that the appellees had never withdrawn the accounts from the Orphans' Court, nor objected to them as originally stated: and they ought not to be prejudiced by the acts of others, without their consent, nor had the administrator withdrawn them. If, therefore, the accounts were, strictly speaking, before the auditors, and not in court, as respected the heirs of Capt. *Carson*, yet, as respected the appellees, they are to be considered as still remaining in court, subject to its controul, and they might certainly decree a balance which neither party disputed. There is nothing in the act of 1794, to prevent the court from making separate decrees, from time to time, as circumstances may require, in favour of the different heirs of an intestate.

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The opinion of the court was delivered by

TILGHMAN, C. J. As these two cases are the same in principle, they may be decided together. *Wm. Flintham* the appellant, is the administrator of the goods, &c. of *Elizabeth Febiger*, deceased, and the appellees *Forsythe* and wife, and *L' Amy* and wife, obtained a decree, in the Orphan's Court of *Philadelphia*, for a certain sum of money, being the distributive share of the estate of the said *E. Febiger*, to which *Mrs. Forsythe* and *Mrs. L' Amy* were entitled. The first objection to the decree, was, that the Orphans' Court had no jurisdiction, because the account settled by the administrator before the Register, was never brought before the Orphans' Court. This objection has been abandoned, in consequence of a *certiorari*, by virtue of which, sundry papers were sent up to this court, among which, is the account in question, and it appears that it was before the Orphans' Court when they made their decree. It was then objected, that the decree was irregular, because it was made while the administrator's account was before auditors, to whom it had been referred by the court. To this it was answered, and, we think, satisfactorily, that the appellees never desired the account to be referred to auditors, being content with the settlement made before the Register; neither did the administrator desire it. But it was referred to auditors, at the request of some of the other heirs of *Mrs. Febiger*. The appellees brought suit in the District Court of the City and County of *Philadelphia*, against the administrator, and obtained a verdict and judgment, for the amount due to them respectively, on the account as settled before the Register. The Orphans' Court, therefore, had a right to decree in favour of the appellees, according to the settled account, which was undisputed by either party. The appellant could suffer no injury, as this court would have rectified any error which he could show in the account. But in one respect, the Orphans' Court went too far, for they decreed that the administrator should pay *the costs of the suit in the District Court*. In this we think they were wrong, for they had nothing to do with that judgment. They had a right to decree on the account before them, and had no right to order payment of costs incurred in another court. It may be well enough to mention, that it appears to have been the object of the appellees, by their proceedings in the Orphans' Court, not to obtain payment by the process of that court, but to enable themselves to recover on a bond, which the administrator had given, with security, by order of the court, when he had obtained permission to sell part of the real estate, the condition of which bond was, that the proceeds of sale should be paid, *according to the decree of the Orphans' Court*—so that without a decree, there would have been difficulty in recovering on the bond. Upon the whole, it is our opinion, that the decree of the Orphans' Court should be reversed, so far as it orders, that the administrator

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shall pay to the appellees, the costs of suit, in the District Court for the City and County of *Philadelphia*, to wit, the sum of 26 dollars and 50 cents, and that the residue of the said decree be affirmed.

Decree reversed as to the costs of suit, and affirmed as to the residue.

[PHILADELPHIA, DEC. 30th, 1822.]

DAVIS, Assignee of Morrison, *against* BARR and another.

IN ERROR.

A party, on taking a bond and warrant, agreed, by a separate writing, not to enter up judgment, nor get it done by any body else. He afterwards assigned to another for a valuable consideration, without notice of the agreement, who entered up judgment.

Held, 1st, That the judgment was valid.

2d, That the obligee was a good witness to prove, that the assignee had no notice of the agreement.

ERROR to the Court of Common Pleas of *Chester* County.

On the 4th *March*, 1816, a bond and warrant of attorney were executed by the defendants, *John Barr* and *Conrad Barr*, in favour of *John Morrison*, in the penal sum of 2,200 dollars, conditioned for the payment of 1100 dollars, on the 20th *August*, 1817. On the 30th *March*, 1816, *John Morrison*, by indorsement on the bond and warrant, assigned the same to the plaintiff, *Ellis Davis*, who procured judgment to be entered up, on the 16th *April*, 1816, in the Court of Common Pleas of *Chester* County. On motion of the defendants in the court below, to set aside this judgment, as improperly entered, the court directed an issue, which was tried by jury before HALLOWELL, *President*, at a special court, and a verdict was rendered for the defendants.

On the trial, the defendants offered to give in evidence, an agreement, or memorandum in writing, signed by *John Morrison*, on the day of the date of the bond, in these words:

This is to *serty*,^a that I am never to enter the bonds that I have against *John Barr* and his father *Conrad Barr*, in the office at *Westchester*, nor get it done by any body else.

John Morrison,
March the 4th, 1816.

Witnesses present.

Conrad Barr,
William Morgan.

a So in the original.

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This evidence was objected to by the plaintiff, but the court admitted it, and the plaintiff tendered a bill of exceptions.

The plaintiff offered *John Morrison*, the obligee, as a witness on his behalf, and the defendants examined him upon his *voir dire*. He stated, that he had no interest in this cause, and was therefore sworn in chief. On his examination in chief, he stated, that he had assigned the bond without informing the plaintiff of the agreement, not to enter judgment. The court, on the disclosure of this fact, declared *Morrison* an incompetent witness, and rejected his testimony, and the plaintiff excepted.

The court charged the jury, that the plaintiff took from *Morrison* the assignment of the bond and warrant, subject to every equitable consideration and agreement, to which they were subject in the hands of the original obligee. That if, before he took the assignment, he had inquired of the obligor, he would have been informed by him of the agreement, not to enter judgment thereon in *Chester County*. That every man who takes an assignment of a bond in *Pennsylvania*, if he wishes to be safe, must make such inquiry before he takes it. The plaintiff, therefore, being bound by the agreement proved, the judgment entered was irregular and invalid; and of course, the verdict ought to be for the defendants. On one of the points proposed by the plaintiff, the court concurred therein, that the assignment of the bond to *Davis*, was not a violation of the agreement, but that the operation of that agreement was, to prevent the plaintiff from entering the judgment in *Chester County*.

To this charge the plaintiff excepted.

Edwards for the plaintiff in error.

1st. The first question is, whether the paper signed by *Morrison*, and delivered by him to *Barr*, was admissible in evidence. We contend, that it was not, because it was the admission of parol evidence, to vary an instrument under seal. The principle is well settled, that in an action on a bond, a party will not be permitted to show a condition different from that expressed in the bond. 1 *Phill. Evid.* 424. In *Skinner v. Henderson*, 1 *Root.* 252, parol evidence was not allowed to shew, that a specialty was delivered to the party on certain conditions. To the same point are *Paine v. M'Intire*, 1 *Mass. Rep.* 69. 10 *Mass. Rep.* 244. *Atkinson v. Scott's Executors*, 1 *Bay.* 307. *Townsend v. Weld*, 8 *Mass. Rep.* 146. The plaintiff, in the present instance, having paid the value is a purchaser for a valuable consideration without notice.

2d. Was *Morrison* a competent witness? He was examined, by the defendants on his *voir dire*, and declared that he had no interest: after such declaration, he could not be proved to be interested by evidence *aliunde*. 1 *Phill. Evid.* 96.

The court intimated, that this point was settled. You cannot after examining a witness on his *voir dire*, produce evidence to prove him interested: but if it comes out in the course of the exa-

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mination of the witness, that he is interested, the court will reject him.

Edwards then relinquished that point, but insisted, that the witness was not interested. To constitute such an interest as will disqualify a witness, it must be a legal, fixed interest, not a remote or contingent one: for this only affects his credit. 1 *Phill. Evid.* 39. *Stockham v. Jones*, 10 *Johns.* 21. *Stewart v. Kip*, 5 *Johns.* 256.

There was nothing in *Morrison's* evidence, to shew a fixed, determinate interest. No objection was made, until he had acknowledged, that he had not disclosed the private agreement. Why did he not disclose it? Because, as we contend, he thought the agreement was at an end: and if so, it absolves him from a charge of fraud on *Davis*, or liability to *Davis*, in case *Davis* failed in establishing the judgment. The agreement itself may be considered as fraudulent, if it enabled the obligee to defraud third persons. But the operation of this agreement was confined expressly by its terms, to the original parties: it does not extend to an assignee of the bond and warrant, and a judgment entered by him is valid. The charge of the court was, therefore, incorrect in stating, that the assignee stood in the place of the obligee, and took the bond subject to all the equities to which the obligee was liable.

Tilghman, contra.

The honesty and equity of the case, and the agreement of the parties, are in favour of the defendants. The agreement bears the same date with the bond; it was signed and executed at the same time, and before the same witnesses; and was one of the considerations on which the bond was given. It ought to be considered as inserted in the bond. The effect cannot be destroyed by the circumstance of its not being under seal: there is no magic in a seal.

1st. The first question is, whether in *Pennsylvania*, under the circumstances of the case, this paper was proper evidence to be presented to the jury. Since the case of *Hurst v. Kirkbride*, 1 *Binn.* 616, parol evidence has, uniformly, been received, of what passed at the execution of a deed, to explain, vary and control sealed instruments, provided it be by circumstances occurring at the time, and in the presence of the parties. In proof of which, may be mentioned, among others, the cases of *Thomson v. White*, 1 *Dall.* 424. *Field v. Biddle*, 2 *Dall.* 171. 1 *Yeates*, 132. *S. C. M' Minn v. Owen*, 2 *Dall.* 173. 1 *Yeates*, 135. *S. C. Cozens v. Stevenson*, 5 *Serg. & Rawle*, 421. It is a clear case of fraud, if a paper be obtained for one purpose, and used for another, *Birchfield v. Castleman*, *Add.* 181. If a party be drawn in by assurances, or promises to execute a writing, equity will grant relief. 1 *Vern.* 296. The plaintiff can blame no one but himself. It is the duty of every person, about to take an assignment of a bond, to go to the obligor, and ascertain whether there is any equitable claim against it.

2d. *Morrison's* evidence was properly rejected. If the cause were decided in favour of the plaintiff, by his evidence, he overthrew a written instrument signed by himself, and escaped with

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impunity. The verdict would relieve him from responsibility to *Davis*, for fraudulently concealing the agreement. Whereas if the verdict were for the defendants, he was answerable over to *Davis*, for the debt, and for the costs which had been incurred.

As to the charge of the court, it is excepted to because the court told the jury, that the assignee took the bond subject to every equity between the obligor and obligee; that the assignee stood in the place of the obligee: that the assignee was bound by the agreement of the obligee. The principles laid down by the court are supported by the cases determined in this state. In *Inglis v. Inglis's Executors*, 2 *Dall.* 49, the court say, that if the obligee of a bond assigns it, notice ought to be given to the obligor, in order to prevent his paying the money to the person who has thus parted with his interest. From this case it is apparent, that it is not incumbent on the obligor to seek for the assignee, but it is the duty of the assignee to inquire of the obligor what equities he has: and this is the only mode which can, in ordinary cases, be pursued. The obligor cannot know to whom the bond may be assigned: but the assignee must always know who is the obligor, and in this state the law obliges him to inquire, and if he does not, construes such omission to be laches on his part. In *Rundle v. Ettwein*, 2 *Yeates*, 23, the assignee of a bond, without notice, is considered as standing in the place of the obligee. If the present case be viewed as a case between the defendants and *Morrison*, no court could say that *Morrison* could enter judgment in violation of his agreement. In *Solomon v. Kimmel*, 5 *Binn.* 232, it was determined, that the assignee of a bond takes it subject to all the equity which the obligor had against the obligee, unless the obligor promoted the assignment: and therefore in a suit by the assignee, the obligor may, under the plea of payment, show that the bond was given for lands to which the obligee had no title. In *Bury v. Hartman*, 4 *Serg. & Rawle*, 175, a payment made by the obligor to the obligee before notice of the assignment was held good against the assignee.

J. R. Ingersoll, in reply. As to the competency of *Morrison*, as a witness, it is true, that if it came out in any part of his testimony that he was interested, the court did right to reject him. But he was not interested, or if interested, he would be equally interested, let the cause terminate as it may. He would be liable to an action by the plaintiff or defendant, whatever might be the result. But in truth, the agreement, such as it was, was confined to the obligee, and did not extend to an assignee.

As to the questions of admitting parol evidence, or papers of an inferior character, to vary contracts under seal, courts of law do not admit them, and the question is, would a court of equity admit them in such a case as this. There was neither fraud, mistake, nor trust; or if there were fraud, it was practised not by the assignee, but against him. The error into which the plaintiff was led, was owing to the conduct of the *Barrs* themselves, in resorting to

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a secret instrument of writing, instead of placing the agreement in the warrant itself. That memorandum might have been introduced into the warrant, and if it has been omitted by them, fraudulently or otherwise, no court of equity would relieve against the judgment. Its being in writing is nothing. It was distinct from the bond, and inferior in its nature: and its object was to contradict the power of attorney in an essential point.

The sanction of such an agreement would tend to encourage fraud and litigation. The defendants have no equity, for they ought not to have resorted to this secret agreement. It is objected, that the assignee ought to have given notice of the assignment to the obligor. He is not bound to give notice; but if he does not, he runs the risque of payment being made to the obligee.

The opinion of the court was delivered by

GIBSON, J. We commonly say that the assignee of a bond, under our act of assembly, takes it subject to every equity which might have been set up against it in the hands of the obligee: but this, however generally true, is to be understood with some restriction. The rule established in *Wheeler v. Hughes*, has never been carried further than to put the assignee in the place of the obligee as to *defalcation* and *want of consideration*; and that it has been carried even so far, is owing to the special wording of the act, which enables the assignee to recover only "so much as shall appear *to be due* at the time of the assignment." Had it not been for this, I apprehend the assignee would not have been affected by *any* transaction between the original parties; for it certainly is not a general principle of equity that a purchaser for valuable consideration, of the legal title to any kind of property, should take it subject to an equity of which he had not notice: and as to policy, I much doubt whether it would not have conduced to fair dealing if our bonds and notes had, in this respect, been put on a footing with promissory notes under the statute of *Ann*. We are however to take the law as we find it; and as to want of consideration or set-off, it is certain that where there has been no fraud on the part of the obligor, the assignee stands on no better ground than that on which the obligee stood. To exclude all transactions between the original parties, it is necessary that it should appear the assignee took the assignment at the instance of the obligor, or at least that the latter stood by with full knowledge of his rights, and without disclosing them. But with any agreement between the original parties, inconsistent with the purport or legal effect of the instrument, the assignee has nothing to do. No such agreement is within the purview of the act; and the assignee is not bound to call on the obligor for information about matters, the existence of which he has no reason to suspect; the necessity of inquiry being limited as I have said to want of consideration and set-off. Then the agreement here, was that the obligor would not enter up judgment in

(Davis, Assignee of Morrison v. Barr and another.)

Chester county; which in no respect affected the existence of the debt but was collateral to it. The warrant of attorney was annexed to the instrument or incorporated with it, (no matter which,) and the right of directing the exercise and application of the power under it, passed by the assignment as an incident of the property in the debt. At law, the agreement not being under seal, was no revocation of the power, although it was a revocation in equity; and to obtain relief against the judgment as an incumbrance, it would be necessary for the obligors to go into chancery for a perpetual injunction against having execution of the land. On what ground of equity would they claim this against an assignee for a valuable consideration and without notice? The bond was made assignable in express terms; and it would seem, from the evidence, the obligors knew that the obligee intended to raise money on it. Taking such an engagement and enabling the obligee successfully to hold out the appearance of a state of things which had no existence in fact, was very like a fraud; and I am satisfied that judgment was well entered up by the assignee, and that it is a lien on the land of the obligors.

As to the competency of the obligee as a witness, it is difficult to see what interest he had to exclude him. He was not liable to the assignee, and he therefore got rid of no responsibility by promoting a recovery in this suit.

Judgment reversed and a *venire de novo* awarded.

[PHILADELPHIA, DEC. 30, 1822.]

SMITH* and another against BLACK.

IN ERROR.

A judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered till after the judgment.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in a suit brought by *John Black* against *Newbery Smith* and *Nathan Smith*, in which that court rendered judgment for the plaintiff below.

The first count of the declaration was on a promissory note signed *N. Smith*, drawn by *Nathan Smith* in favour of and indorsed by *J. Rogers*, delivered by *Nathan Smith* to the plaintiff *Black* in payment for goods sold. The second and third counts were for goods sold. The defendants pleaded in bar to the first count a former recovery by the plaintiff in a suit on the same note against *Nathan Smith*, in the District Court, and that the judgment therein remained in full force and effect. In bar to the second and third counts they pleaded the same judgment, and that the note was received in discharge of the claim for goods sold. The plaintiff re-

(Smith and another v. Black)

plied to the plea in bar to the first count that when the note was given, the said *Newberry* and *Nathan* were partners in trade, carrying on business under the firm of *N. Smith*, the said *Newberry* being a dormant partner, and that the same was unknown to the plaintiff till after the judgment recovered against *Nathan*, and that the note was given for a debt contracted in the purchase of goods delivered by the plaintiff on account of the partnership business. In reply to the plea in bar to the second and third counts, the plaintiffs averred the same facts, and denied that the note was received in discharge of the claim for goods sold. Demurrer and joinder.

Rawle, for the plaintiffs in error cited, *Williams v. McFall*, 2 *Serg. & Rawle*, 280. *Robertson v. Smith*, 18 *Johns.* 459. *Whitman v. Ely*, 4 *Serg. & Rawle*, 454. *Penny v. Martin*, 4 *Johns. Ch.* 566. *Willing v. Consequa*, 1 *Peters*, 301. *Ross v. Deey*, 7 *T. R.* 361.

E. S. Sergeant and *T. Sergeant*, contra, referred to *Sheehy v. Mandeville*, 6 *Cranch.* 253. 5 *Taunt.* 609. *Mildmay's Case*, 6 *Co.* 40. *Bantleon v. Smith*, 2 *Binn.* 148. *Gordon v. Correy*, 5 *Binn.* 550. *Ingham v. Noke*, 1 *Wils.* 89. *Tooker v. Bennet*, 3 *Caines*, 304. 1 *Chitty's Plead.* 30. 5 *Johns* 10. 3 *Johns. Cases*, 71. *Drake v. Mitchell*, 3 *East.* 350. *Lang v. Keppel's executors*, 1 *Binn.* 124. *Higgins's Case*, 6 *Co.* 45. 5 *B. & P.* 474.

The opinion of the court was delivered by

DUNCAN, J. By agreement of parties, all objections as to the form of pleading are waived, and the cause is to be decided on its merits. The case then is this. *John Black*, the defendant in error, sold certain goods to *Nathan Smith*, one of the plaintiffs in error, and took his note, which he put in suit, and prosecuted to judgment, on which, however, he has obtained no satisfaction. Afterwards, supposing *Newberry Smith*, the other plaintiff in error, to be a secret partner, he instituted this action against both. It is to be taken for granted, that when the goods were sold, the note given, and judgment obtained, the fact of *Newberry* being a dormant and secret partner was unknown to the defendant in error; and that the goods for which the note was given, were bought on account of the partnership. If the action can be supported, it excites our wonder, that in a matter which must so frequently have occurred, no trace of the doctrine is to be found in the works of any author, nor precedent in any book of reports; and this silence, though it is not conclusive, yet it affords cogent proof against the action. It is, at least, incumbent on the plaintiff, to show some clear, legal principle, on which it can be supported, and in my humble judgment, as it is without precedent to support it, except one solitary decision, so it is without legal foundation to rest upon. For the first time, the doctrine was broached, was in this country in the year 1810, in the Supreme Court of the *United States*, *Sheehy v. Mandeville*, 6 *Cranch.* 253., and there it was decided,

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“that a several suit and several judgment against one of two makers of a promissory note, was no bar to a joint action against both.” This is a precedent from a very high source, and commands great deference and respect, from the characters of the distinguished and enlightened men who composed that court. Yet whatever importance and consideration we may attach to all their decisions, they are not, in this instance, binding authority.

The same question came before Chancellor KENT, in 1820, *S. & E. Penny v. Martin and others*, 4 *Johns. Ch.* 566. It is the same case in specie as the present. The plaintiffs there brought a suit at law against two partners, as partners in trade, under the firm of R. & M., and recovered judgment, from which they were unable to obtain satisfaction, and afterwards discovered, for the first time, that R. L. & S., three other persons, were dormant partners with R. & M., and jointly interested together in the transaction, out of which the plaintiffs' cause of action arose, and the Chancellor held, he had no jurisdiction to give relief against the dormant partners. It is worthy of remark, that the case of *Sheehy v. Mandeville*, was not noticed by the Chancellor, and though he gave no express opinion, whether the remedy at law was lost, yet from his course of reasoning, and the note to the report, we clearly discover the impression, that an action could not be supported at law. For in the note, he mentions the case of *Consequa & Willing*, decided in 1816, 1 *Peters Rep.* 301. and said, he had not met with any other opinion or *dictum* that applied fully to the question. *Kuhn*, a dormant partner of *Willing & Francis*, was offered as a witness, and objected to, as interested, because *Willing and Francis* had given a note to *Consequa*, on which they were sued, and a verdict rendered; and it was alleged, if *Consequa* was not able to obtain satisfaction against them, he might afterwards sue *Kuhn*, as a dormant partner, and WASHINGTON J. held, that a judgment on the note, against *Willing & Francis*, would as completely extinguish the original debt, as if they had given a bond for it, and that if *Consequa* brought an action against *Kuhn* for it separately, he might defeat it by a plea in abatement, and a judgment in favour of *Consequa*, would be a bar against any action he might bring against the three partners, *Willing Francis & Kuhn*, and the Judge denied, that though *Consequa* might have no remedy at law against *Kuhn*, that he could be relieved in equity by shewing his ignorance that *Kuhn* was a dormant partner. This decision is of immense weight here, where we exercise a mixed jurisdiction of law and equity, and where if it was competent to a Court of Chancery to grant relief, this court would in some form of action reach the equity. For though our courts of law exercise chancery powers by a different medium, yet they are as much bound by rules of equity, as a chancellor, and will never go beyond the limits of chancery powers. As these are the opinions of two very learned Judges, that the action would not lie at law, nor relief be granted in chancery, and one of them Mr.

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Justice WASHINGTON, who decided the case of *Sheehy v. Mandeville*, and in 1821, the same question was decided in the same way in the Supreme Court of *New-York*. *Robertson v. Smith and others*, 18 *Johns.* 459. That case was fully discussed by the counsel, and C. J. SPENCER, who delivered the opinion of the court, embraced in the comprehensive view he took of the subject, all the *authorities* bearing on the *question*, and considered the decision of the Supreme court of the United States, with equal candour and ability; expressing his dissatisfaction with the train of reasoning adopted in that case. To his very luminous and able arguments I refer generally, as conveying my own opinions. To the terms in which it was delivered, I could add no force, and it would be doing injustice to the argument to attempt to abridge it. I will, therefore, content myself with stating other reasons against this action. The want of notice is mainly urged as the ground of the action. No notice, is generally a defensive affirmation. It is used as a shield, and not a sword. It is always a negative allegation, consisting of a denial, and not susceptible of proof. To undertake to prove it against a mere denial, would be a dangerous matter. As it is used in chancery, it requires the oath of the party. But at common law, and even in our blended jurisdiction of law and equity, his opponent could not require that; and to put him to proof of the fact, the precise time when notice was given against a naked allegation, without either oath or any proof, would be contrary to all law, and all equity, as it would be requiring of him an absolute impossibility.

The spark of equity must be struck out of the want of notice. Let us advert to the consequences, and see first whether to allow this would not be departure from all our legal notions of actions, either on torts or contracts. In torts, the principle is well settled; if a plaintiff has in a former action recovered damages for a battery, a judgment for them, he cannot afterwards bring another action for the same battery, because afterwards, in consequence of it, he lost a piece of his skull. There is an authority to show, that subsequent damages create no new cause of action, *Fetter v. Veal*, 12 *Mod.* 543. There the cause of action arose from the beating, and not from the consequences which ensued from it. So here the cause of action was created by the breach of the contract, and not by the subsequent discovery that *Newberry* was a partner. The cause of action accrued at the moment there was a breach of the contract: the subsequent discovery gave no new substantive cause of action. If the consequence of a tort gave a new cause of action, then the statute of limitations would only accrue from the time it was discovered, and so in contracts, the discovery of a new party, or some occult matter which produced a subsequent damage, would give a new cause of action. Now all this is contrary to every received opinion with respect to judgments. No principle is better settled than that a judgment once rendered absorbs and merges the

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whole cause of action, and that neither the matter, nor the parties, can be severed, unless indeed where the cause of action is joint and several, which certainly actions against partners are not. *Transit in rem judicatam*. There might be a recovery at the end of sixty years. The right of action would never be closed by any delay or any number of judgments. The *rem judicatam* would never close, but be a wound never healed, opening on every new discovery of a party. It would indeed be the everlasting suit. As suppose there were ten partners, nine of them dormant, from A. to L; A., the ostensible partner is first sued, judgment obtained, but no satisfaction. At the end of six years B. is discovered, sued, and judgment against him, with A. and so on every sixth year, until there are ten actions and ten judgments on one original action. For if the argument is worth any thing, it goes to the full extent, that as soon as a new partner is discovered, a new cause of action arises, and so on *ad infinitum*. It is by putting an extreme case, the solidity of any position, the soundness of any argument is tested. For if it will not answer every case, no dependence can be placed on it. When the law says, that limitation only runs from the time of discovery of a fraud, and that no length of time will protect a fraud, it proceeds on a different principle, than want of notice. It is on the ground of actual fraud, practised by one contracting party on another. But in the case of a dormant partner, there is no actual fraud committed on the vendor; he does not give credit under the belief that there is a secret partner. If he did, then as to him there was no dormant partner. Ignorance of a fact will not render a transaction *fraudulent*. It is the concealment of a fact, which if it had been communicated, and was the duty of the party to communicate, the other would not have entered into the contract; but this never can apply to *latent partnerships*. Black never inquired whether *Nathan Smith* had partners; he gave the whole credit to him. Besides, on whom are the costs of the different actions to be levied? Are they to be recovered from the parties to each action, or to be accumulated and fall on the heads of the ten defendants in the tenth action? I am of opinion; that the law will not suffer this splitting up either of actions or severing of persons, and that where the cause of action is a joint one, that a judgment once rendered, extinguishes the original cause of action, and is a bar, not only to a subsequent action brought against the same persons, but against all others; that the judgment puts an end to all *litigation* on the subject matter of the action, and that a discovery of a *new party*, or the happening of new damages does not give a new cause of action, and the judgment should be reversed and judgment rendered for the defendants. ^a

Judgment reversed and judgment rendered for the defendants.

(a) Note by DUNCAN, J. Since this opinion was delivered, I find that in 1816, the same point was decided in the Supreme Court of *Massachusetts: Aca Ward v. Henry*

[PHILADELPHIA, DEC. 30, 1822.]

The United States *against* EDMÉ.

A witness attending before a magistrate to give his deposition under a rule of this court, in a suit depending, will be discharged, if arrested on his return from the magistrates office, under a writ from the District Court of the *United States*, in a suit for penalties.

Such application may be made in the absence of the defendant, and after bail given.

THIS was a rule to show cause, why the defendant, *John Edmé*, should not be discharged from the custody of *John Conard*, Esq. marshal of the *United States* for this district, granted on the affidavit and application of *Phillips*, the defendant's attorney.

A *capias ad respondendum* in debt, for 10,000 dollars for penalties, had been issued at the suit of the *United States* against *Edmé*, from the District Court of the *United States* for this district, in which bail was marked in 15,000 dollars. He was arrested by the marshal on this writ, whilst he was returning from his attendance on a magistrate, before whom he had made a deposition as a witness in the case of *Gravelle v. Gouiram*, depending in this court, under a rule to take depositions. The marshal was in the justice's office during the examination of the witness, but did not arrest him until after he had left the office. *Edmé* had given bail to the marshal, and an application was made to the District Court of the *United States*, to reduce the amount, but that court refused it. He had now left the state.

Phillips, in support of the rule, contended, that the privilege of witnesses from arrest *eundo, morando, et redeundo* was well established, as was also the authority of the court against whom the contempt was committed to discharge them on motion: and there is no difference whether they attend voluntarily or on *subpœna*, or whether it is an attendance in court, before an arbitrator, commissioners of bankrupt, or elsewhere in the course of justice, if it be *bona fide*. 1 *Tidd's Prac.* 174: 5 *Bac. Ab.* 718. This privilege, which is the privilege of the court, is extended to the case of parties. *T. Hurst's Case*, 4 *Dall.* 387. *Barnes' Notes* 276. The rule to take depositions was regularly entered pursuant to the provisions of the act 20th March, 1810, *Purd. Dig.* 17. There is no prerogative in the *United States*, in an ordinary action of debt for penalties, that can exempt them from a liability to these principles, nor in the courts of the *United States*, by which the

and *Thomas Johnson*, 13 *Mass.* 148. It was there determined, that to an action against two on a joint promise, the plea of a former judgment against one of them, upon the same promise, was a good bar. There too *Thomas* was a dormant partner, and at the commencement of the first action, was unknown to the plaintiff, and *WILDE*, Justice, who delivered the opinion of the court, said, that the contract as far as respects *Henry*, must be considered as merged in the former recovery against him, and no instance had been proved, nor could be found, of two judgments being held good against the same person for the same cause of action.

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power of the state courts is in this respect controlled or diminished. On the contrary, the act of congress of the 2d March, 1799, sect. 65. (*Ing. Dig.* 233) expressly provides, that in all cases in which suits or prosecutions shall be commenced for the recovery of duties or pecuniary penalties prescribed by the laws of the *United States*, the persons against whom process may be issued, shall and may be held to special bail, subject to the rules and regulations which prevail in civil suits in which special bail is required.

C. J. Ingersoll, district attorney of the *United States*, objected to the defendants discharge on several grounds.

The application and affidavit were made by the defendants attorney, and at the instance of his bail, after the defendant had gone beyond sea, by which he would, if the discharge were to take place, escape the debt. Besides, an unsuccessful application has been made to the District Court, and the defendant has thereby admitted the jurisdiction of that court, and waived the ground of privilege. Privilege is lost by the defendant's pleading. *2 Roll. Ab.* 275. In *Commonwealth v. Hambright*, *4 Serg. & Rawle*, 149. this court would not discharge a party on *habeas corpus*, on the ground of privilege, after a refusal by the court in which the suit was brought to grant his application. The District Court of the *United States*, in which the suit was brought, was the proper authority to apply to. The Common Pleas cannot discharge a man arrested by process from the King's Bench. *4 Com. Dig.* 476, *Privilege*, 4. 3.

But supposing this court the proper tribunal to act, there has been no contempt of this court. *Edme* had left the magistrate and was a mere volunteer, not bound to attend by any subpoena or process, and therefore the privilege of the court is not infringed. There is no instance of a volunteer, not in his own cause, who has been protected. At all events, it is a privilege not available against the *United States*. It is not available against the crown. *2 Roll. Ab.* 274, *5 Bar. Ab.* 618. *4 Com. Dig.* 475. *17 Vin.* 517. There is the same reason for allowing privilege to the *United States* as prerogative to the crown, namely, that the public good requires it. In the *People v. Gilbert*, *18 Johns.* 227, it is held, that the government is not bound by an act of limitations, unless named.

The opinion of the court was delivered by

DUNCAN, J. A *capias* in debt had been issued by the *United States* against *John Edme*, debt 10,000 dollars for certain penalties, in which bail was marked in 15000 dollars. He was arrested by the marshal on this writ, while he was returning from his attendance on a magistrate, before whom he had made a deposition as a witness in the cause of *Gravelle v. Gouiram*, depending in this court, under a rule of court. The marshal was in the justice's office during the examination of the witness, but did not arrest him until

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after he had left the office. On the affidavit and application of *Edme's* attorney, a rule was granted to shew cause, why he should not be discharged from the arrest. Cause was shown by the district attorney: 1st. Because the application and affidavit were made by *Edme's* attorney, and at the instance of his bail. 2d. Because he was not in actual custody, but had given bail to the marshal, and was now beyond the process of the court of the *United States*, and the application was after an unsuccessful attempt in the District Court to lessen the amount of bail. 3d. The rule to take depositions was not entered agreeably to law. 4th. That his attendance before the justice was voluntary, and not under any compulsory order or subpœna. 5th. That privilege cannot be claimed where the *United States* are a party; or if it can it is only during actual attendance. The first and second objections to the discharge must be taken in connection. The power to discharge suitors and witnesses is necessarily inherent in every court, and though the court from which the process issues may discharge, for the abuse of their process on the privileges of suitors and parties in other courts, yet the court on whom the contempt has been committed is the most suitable forum, and the practice generally is to apply there for redress. A chancellor exercises this authority, whenever the proceeding under which the privilege is claimed issues from that court. Indeed some doubts have been of late entertained whether the application must not be made to that court, of which the arrest is a contempt, and I can entertain no doubt of the power of that court to discharge, though the court from which the process issues, have declined or refused to discharge, and as this power is necessary for their own protection, it cannot depend on another tribunal to grant or withhold it. It is the privilege of the court, yet it is the protection of the suitor or witness to whom the common law gave a writ of privilege in that case, in lieu of which summary relief on motion is now substituted, and this cannot be denied on proper grounds shown, for there is no such thing in the law as writs of grace and favour issuing from the judges: they are all writs of right but not writs of course. *Wilmot's Opinions and Judgments*, 87. The giving a bail bond is so far from waiving the privilege, that the court when they discharge will order it to be delivered up to be cancelled. The defendant is not obliged to apply in person, his bail or his attorney may. Nor must he continue in custody, or give up his own lawful pursuits and remain stationary until the sitting of the court. *Edme* has done no act to waive the privilege. He has neither imparled or pleaded. The first and second objections are thus disposed of. There is no weight in the third. The rule is regularly entered; and if it were not, it lies not in the mouths of those who have treated the process of the court with disregard, to say your proceedings were irregular, and we will treat them with contempt. They were not void. The court had jurisdiction, and it is not for third persons collaterally to object irregu-

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larity. While the rule stood on the records of the court, it was a rule in full life and force. The fourth and fifth require more serious consideration.

The national and state legislatures, and the national and state courts, act wisely in evading all *legislation* and decisions, on the delicate questions of clashing jurisdictions. Where State powers end, and United States authority begins, is difficult and tender ground, to be trod over lightly and warily. It is unnecessary to say, whether congress possess the constitutional right to deprive the state courts of the power of protecting themselves from contempts committed on their proceedings, on suitors or witnesses necessarily attending the execution of their orders and rules. They have not done so. The United States, in certain cases, have by law, a priority in the payment of their debts; but I do not acknowledge any claim of superiority in the remedy or execution of their process in civil suits over those of the citizen. Even with the prerogatives of royalty, this is not one possessed by the British monarch, whose process of extent overreaches the rights of his subjects, in a manner not quite congenial to our republican opinions. Yet even in that country, a party attending a commission of bankrupt, was discharged from arrest, at the suit of the crown, while he was said to be in the actual performance of the duty of going through his examination, and actually attending the commissions for that purpose, *Cook's Bank. Law*, 715. In the instance before us, though the Marshal executed the process with all decorum, yet it cannot escape our observation, that he followed the man into the Justices Office, and though he did not actually arrest him in the Justice's presence, yet he did so in the very hour of his examination, and before the deposition was dry. I consider him as much protected, as if he had been arrested just after his examination, as a witness in this court, going out of the hall of the court, and having passed the verge. Otherwise the privilege would be a mere mockery, and even though the form of the process as attachment for contempt be criminal, and in the name of the United States, or the State, if it be only to compel the payment of money, the party is protected from arrest; and the very act under which bail was demanded, *act of Congress, 2d March, 1799*, shews, that the United States, do not assert such a prerogative. It provides that the United States may hold to bail in actions for penalties, *subject to the rules and regulations which prevail in other civil suits with respect to bail*. My decided opinion is, that in civil suits by the United States, there is the same privilege to suitors and witnesses, as the law gives in actions by one citizen against another. It is unnecessary to review with minute particularity, the cases *pro* and *con*, on this subject of privilege. The clear principle is this; that protection to a witness ought to be at least as extensive, as to a party: that when it is not a mere cover to a skulking debtor, it ought to be considered liberally. Originally, indeed, it embraced only attendants

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on courts; but has extended itself in process of time, to every case where the attendance was a duty in conducting any proceedings of a judicial nature, as commissions of bankrupt, a Judge at his chambers; and whatever doubts might have been entertained, as to a witness attending on arbitrations under a rule of court, he is now just as much protected as a witness attending a Judge at *Nisi Prius*. It has been carried still further to a witness going before a Master in Chancery to make an affidavit. Parties and witnesses are privileged during attendance before referees on a rule of submission, under the act of 1705, and what affords this protection? a rule of court. So here there is an order of court to authorize taking the deposition, and the court must necessarily possess the power to protect from arrest all who are necessarily attending the execution of their own order. Nor is it any objection, that the witness did not attend by compulsion. The party himself would be protected during the examination, *cundo, morando, et redeundo*, and it is equally reasonable, that the witness whose examination he was attending, should be entitled to the same exemption.

Rule made absolute, and *John Edmè* discharged from the custody of the Marshal.

[PHILADELPHIA, JAN. 6, 1823.]

BEHNCKE against KING.

IN ERROR.

If a Seaman ship at the port of *Philadelphia*, and render himself on board, and afterwards desert at *Chester*, on the voyage down the river, the surety is liable to the forfeiture imposed by the second section of the act of congress, of the 26th July, 1790.

ERROR to the Court of Common Pleas of *Philadelphia* County, where judgment was rendered in favour of *Charles King*, the plaintiff below, against the plaintiff in error, *John C. Behncke*, on an appeal from the judgment of Justice *Renshaw*. It was an action brought by the plaintiff below, *Charles King*, master of the ship *Recovery*, against *Behncke*, as surety for a certain *Daniel Knowlton*, a seaman, who signed shipping articles, by which he bound himself to serve as a mariner on board the *Recovery*, on a voyage from the port of *Philadelphia* to *Madeira*. *Knowlton* rendered himself on board according to agreement, and remained in the ship till she had proceeded on her voyage as far as *Chester*, in the river *Delaware*, where the ship being stopped by the ice, he deserted, and did not return, so that the ship went to sea without him. The suit was brought under the second section of the act of congress of the 20th July, 1790, to recover the sum advanced to *Knowlton*. In the Court of Common Pleas, the majority of the court charged

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the jury, that the plaintiff below, was entitled to recover, and the defendant tendered a bill of exceptions.

McIlvaine for the plaintiff in error, contended, that the seaman having been on board the ship when the voyage began, the surety had fulfilled his obligation, and was no farther responsible. The act of congress of the 26th *July*, 1790, Sec. 2, ^(a) provides for the forfeiture of the sum advanced in two cases; first, where the seaman shall *wholly* neglect to render himself on board; second, where after rendering himself on board, he deserts, so that the vessel shall proceed to sea without him. The vessel proceeds to sea when she begins her voyage: when she begins to proceed towards the sea. The fifth section amply provides for the case of desertion by a seaman after the voyage has begun, by specific penalties, of a different kind, and there is no necessity to extend the construction of the first section, in order to embrace the present case. There is good reason why the surety should be discharged from the moment the seaman renders himself on board: for he is then under the power of the master, who may detain him; or, if he escape, enforce the penalties provided in the fifth section. In *Cotel v. Hilliard*, 4 *Mass. Rep.* 664, it is declared by the court, that the second section of the act of congress, intended the forfeiture expressed in it for conduct previous to the commencement of the voyage: and that in the fifth section was intended, such conduct of the seaman as should happen after the commencement of the voyage. So that proceeding to sea, and the commencement of the voyage, were there held to mean the same thing; and agreeably to this decision, the plaintiff below ought to have proceeded for the penalties and forfeitures imposed by the fifth section, and not those embraced by the second. If the words, proceed to sea, are to receive a strict construction, and do not signify, proceed towards the sea, then the inquiry will be, where the sea commences. It is so difficult to fix the precise line, that seaman and their sureties would be much embarrassed by the inquiry. It has been held that a road, haven, or even river, not within the body of any county, is high sea, in the idea of civilians. *Montgomery v. Henry*, 1 *Dall.* 50. In a note to 2 *Pet. Adm. Dec.* 97, 98, (*appendix*) it is said, that the common law courts, have often determined, that a vessel has not proceeded to sea, within the meaning of the act of congress, until she has left the Capes of the *Delaware*. But no authority is cited for this position: and it certainly has never had the sanction of this court, if it were even so determined in the lower courts.

Lowber, contra. The only question is, what is the meaning of the words in the second section of the act, "so that the vessel shall proceed to sea." They evidently contemplate the vessel's having arrived at the sea, being on the sea—and not merely going towards

(a) See the section recited in the opinion of the Chief Justice.

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the sea. It is true, there is some difficulty in determining exactly where the sea commences: but it is sufficiently well understood, that in common language, it means when the vessel is beyond the Capes of the *Delaware*. The second and fifth sections of the act of congress, are enacted with reference to distinct objects: the second being intended for desertion in a port or river, where the opportunity of escape is comparatively easy, and where the surety may have knowledge of the offence, and procure the seaman's return: whereas, the fifth section is enacted with a view to desertion in a foreign port, or place, out of the view or knowledge of the surety. In the latter cases, therefore, the master is to stop the wages, and hold the goods and chattels of the mariner. In the former, he may resort to the surety. In *Cotel v. Hilliard*, all that the court decided was, that a seaman who, after having rendered himself on board, deserted before the vessel left the port, was not within the penalties of the fifth section, but was embraced by the second section. But they had not before them the case of a seaman who deserted after the voyage began, but before the vessel had got to sea: and their language, in reference to such a case, must be deemed extra-judicial.

The opinion of the court was delivered by

TILGHMAN, C. J. (after stating the facts). The question is, whether, on these facts, the plaintiff be entitled to recover of the defendant, a sum equal to that which was paid by advance, to the said *Knowlton*, at the time of signing the contract, over and besides the sum so advanced. This depends on the act of congress, "for the government and regulation of seamen in the merchants' service," passed the 20th *July*, 1790.

The first section of the act, directs, "that the master shall, before he proceeds on the voyage, make an agreement in writing, or print, with every seaman or mariner on board, declaring the voyage, and the term of time, for which such mariner shall be shipped." By the second section it is enacted, "that at the foot of every such contract, there shall be a memorandum in writing, of the day and hour, on which such seamen or mariners shall render themselves on board, to begin the voyage. And if any such seaman or mariner, shall neglect to render himself on board the vessel for which he has shipped, at the time mentioned in such memorandum, and the master or other officer, shall on the day on which such neglect happened, make entry in the log-book, of the name of such seaman or mariner, and shall in like manner, note the time that he neglected to render himself, (after the time appointed,) every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed on, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board such vessel, or having rendered himself on board, shall afterwards

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desert and escape, *so that the vessel shall proceed to sea without him*, he shall forfeit and pay, to the master, or owner of the vessel, a sum equal to that which shall have been paid to him in advance, at the time of signing the contract, over and besides the sum advanced, which may be recovered against him *or his surety*." This second section contemplates two kinds of default, or misconduct, for which different penalties are inflicted. The first is, where the seaman renders himself on board, but not punctually at the time appointed, for which he is subject to the penalty of one day's wages for each hour of default. The second is, where the seaman either neglects *wholly*, to render himself on board, or having rendered himself, afterwards deserts, *so that the ship proceeds to sea without him*, in which case he forfeits double the sum which has been advanced to him. The present case, is a default of the second description. The seaman rendered himself on board, and afterwards deserted, and the ship *proceeded to sea without him*. It is within the very words of the act, unless it can be made out, that going from *Philadelphia* to *Chester*, is a *proceeding to sea*, for then the ship did not proceed to sea without him. It is certain, that when the ship arrived at *Chester*, she was not *at sea*, and therefore, I do not comprehend how she had *proceeded to sea*. The defendant's counsel say, that a ship may be said to *proceed to sea*, as soon as she *begins to proceed towards the sea*, in other words, as soon as she commences the voyage. This construction is too refined—too much at variance with the meaning of the words as generally understood. And moreover, it seems at variance with the understanding of the legislature—for in the first section, where it was intended, that certain things should be done before the *commencement of the voyage*, it is said so. The master is directed to make an agreement with the seamen, *before he proceeds on his voyage*, not before he *proceeds to sea*. So in the second section, there is to be a memorandum in writing, of the day and hour, when the seamen shall render themselves on board *to begin the voyage*. Neither will the object of the law be attained, on the defendant's construction. The object was, to deter the seamen from deserting, as long as they might be supposed to have it in their power to desert—that is to say, until the ship got to sea. It is quite as easy to desert at *Chester*, as at *Philadelphia*. But when once at sea, there is no danger of desertion. It is objected, that there may be difficulty in deciding, when a ship is *at sea*. That may be ascertained by the opinion of seamen. And supposing there be a little difficulty, it is no reason for resorting to a construction, which would deprive the law of its effect in a very material part. But the defendant's counsel place great reliance on the fifth section, which they say, inflicts a penalty for desertion *after the commencement of the voyage*, and therefore, it is to be intended, that the second section, extends only to desertion *before its commencement*. The fifth section is as follows: "If any seaman who shall

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have subscribed such contract, shall absent himself from on board the vessel in which he shall have so shipped, without leave of the master or officer commanding on board, and the mate or other officer having charge of the log-book, shall make an entry therein, of the name of such seaman, on the day on which he shall absent himself, and if such seaman shall return to his duty within 48 hours, he shall forfeit three days pay, for every day which he shall so absent himself, to be deducted out of his wages; but if he shall absent himself for more than 48 hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the vessel, and moreover, shall be liable to pay to him or them, all damage which he or they may sustain, by being obliged to have another seaman in his place." On this section it is to be observed, that it certainly comprehends some cases, not included in the second section. It comprehends cases of desertion, after the ship has proceeded to sea, viz. in foreign ports, and perhaps that was its principal object, and I incline to the opinion, that it does not comprehend all the cases included in the second section—for instance, the case of a seaman who *never* rendered himself on board the ship, or of one, who having rendered himself, deserted *before the ship sailed on her voyage*. Such was the case of *Cotel v. Hilliard*, decided by the Supreme Court of *Massachusetts*, (4 *Mass. Rep.* 664). I agree with that decision, though I do not wholly agree with the argument of the learned Judge, who delivered the courts opinion. He seemed to think, that the second section was confined to desertion *before the commencement of the voyage*. I think it extends to desertion *before the ship has got to sea*. There is no inconsistency between the second and fifth sections. Even if the fifth section should be so construed as to include cases within the provision of the second, so as to inflict a *cumulative penalty*, according to the argument of the present Judge *Story*, who was of counsel with the plaintiff in the case of *Cotel v. Hilliard*, there would be no inconsistency. Inasmuch then, as this case falls directly within the words of the second section, as well as its spirit, it appears to me that the law is with the plaintiff. In 2 *Peters's Reports*, 97, 98, (*appendix*.) it is said, in a note, to have been frequently decided in the courts of common law, that a vessel has not *proceeded to sea*, within the meaning of the act of congress, until she has left the *capas of the Delaware*. No case is cited, but I presume the author would not have made the assertion without some authority. Be that as it may, as it is quite certain, that the ship had not proceeded to sea, when she had gone no further than *Chester*. I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

[PHILADELPHIA, JAN. 6th, 1823.]

FRIEDLY *against* SCHEETZ.

IN ERROR.

A sheriff's sale cannot be objected to by the purchaser merely on the ground of defect of title; it is binding in all cases, except where there is fraud or a misdescription of the property in some material respect.

A purchaser cannot object to a sheriff's sale a defect of title of which he had notice: and therefore, when he has bought after notifying publicly at the sale such defect, he cannot give evidence thereof in a suit against him for the purchase money.

If the conditions of sale are that the purchaser shall pay in ten days, and the sheriff's deed shall be delivered at a subsequent day, and if the purchaser refuses to comply, the property will be sold at his risk, and the purchaser gives bond to comply with the conditions of sale, he is liable on the bond without a re-sale.

If a declaration on a bond for the purchase money at sheriff's sale omit to state a sale it would be bad on demurrer: but if the defendant go to trial after pleading payment and giving notice of special matter which sets forth the sale, the defect is cured by the notice.

A verdict for the plaintiff in debt finding more than the sum demanded as debt, appearing by calculation to be for the debt and interest, is informal, but may be moulded into form by considering the surplus as damages, and is not error.

ERROR to the Court of Common Pleas of *Montgomery* county, in an action of debt, brought by *Justice Scheetz*, the defendant in error, against *John Friedly*, the plaintiff in error, in which there was a verdict and judgment for the plaintiff below, and bills of exceptions were returned with the record.

The declaration stated, that *John Friedly* on the 20th *December*, 1817, by his certain bill obligatory, with his seal sealed, &c. had acknowledged himself to be indebted to the said *J. Scheetz*, in the sum of 2310 dollars, to be paid to the said *J. Scheetz*, agreeably to the conditions: which said conditions were as follows, to wit: "The conditions of this present vendue, held this 20th *December*, A. D. 1817, for the sale of three different lots of land, with the appurtenances thereon; 1st. A lot of ground 65 feet front, by 300 deep, with a frame messuage thereon; lot No. 2. A stone messuage, and two lots of ground, each containing 60 feet front, by 300 feet deep, adjoining lands of *Michael Ludwig*; lot No. 3. A lot of land containing two acres, in the township of *Potts-grove*, whereon is erected a brickyard, adjoining lands of *Henry Varley* and *John Boyer*, in the borough of *Pottstown*; seized and taken in execution as the property of *Henry Friedly*, junior, areas follows, to wit; highest bidder to be the purchaser: the purchaser to pay 50 dollars cash, at the striking off of the property, and the remainder in ten days after: for which a sheriff's deed will be delivered, regularly executed, on the 16th *February* next. If the purchaser refuses to comply with the aforesaid conditions, the property will be sold at his risk. *Justice Scheetz*, sheriff:" to which payment well and truly to be made the aforesaid *John Friedly* bound himself firmly by the same bill. Yet, &c. (laying a breach in non-

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payment of the 2310 dollars, and damages at 3000 dollars.) The defendant pleaded payment, with leave to give the special matters in evidence. Replication *non solvit*, and issue.

The defendant, under this plea, gave notice to the plaintiff, that, on the trial, he would give in evidence, that the obligation on which the suit was brought, was for and on the purchase of a stone messuage and two lots of land, each containing 60 feet front and 300 feet deep, adjoining lands in the borough of *Pottstown*, in the county of *Montgomery*, sold to the defendant, by the plaintiff as sheriff of said county, and as the property of *Henry Friedly* junior, and that he (the said *Henry Friedly*, junior,) at the time of the sale, nor at any time from and after the 24th *May*, 1817, had no estate, right, title or interest in or to the said lots of land: he and *Sophia* his wife having, by deed of the date last mentioned, *bona fide*, and for a valuable consideration, sold and conveyed the said messuage and lots of land, unto *Henry Friedly*, the elder, in fee; so that the consideration of the obligation on which the suit was brought had totally failed.

On the trial, the plaintiff proved the obligation, the advertisement of sale and the conditions of sale stated in the declaration, and the defendant's acknowledgment in writing under hand and seal, dated the 20th *December*, 1817, that the two lots of ground each containing 60 feet front by 300 deep, with a stone messuage thereon, in the borough of *Pottstown*, were struck off to him at his bid, for the sum of 2310 dollars, which he promised to pay to *J. Scheetz*, agreeably to the conditions. He then gave in evidence, that this property was struck off to the defendant at the sale, as the highest bidder, and that on the 14th *September*, 1818, the sheriff's deed was tendered to the defendant, to which he replied, that whenever the sheriff made him a clear title, he would pay him the money, but that he was not ready to pay it at that time; after which the suit was commenced: that at the time of the sale, the defendant read the following paper, there being then many good bidders at the sale. "Notice is hereby given by the subscriber, that the property above mentioned, and to be sold by the sheriff *Justice Scheetz*, as the property of *Henry Friedly*, junior, was not his, nor has he any right, or title to the same, or any part thereof. The title to the lots of land, and premises advertised as aforesaid, is in the subscriber, for a full consideration paid on a *bona fide* purchase, and has been so from before the 25th *May*, 1817. *Henry Friedly*."

The defendant then offered in evidence a deed, dated 24th *May*, 1817, from *Henry Friedly*, junior, to *Henry Friedly*, senior, to show, that the title was not in the defendant in the execution, *Henry Friedly*, junior, as whose property the messuage and lots were sold. This evidence was objected to by the plaintiff, and

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overruled by the court, and the defendant tendered a bill of exceptions.

The verdict was for the plaintiff.

Kittera, for the plaintiff in error, assigned several errors.

1. The court erred in rejecting the deed from *H. Friedly*, junior, to his father. Their decision cannot be supported, unless it be maintained, that the purchaser at sheriff's sale is, in all cases, bound by his bid, whereas there may have been fraud which would destroy the validity of the sale, and which perhaps could not be inquired into without this deed. But as a general principle, the purchaser at sheriff's sale may, at any time before money paid, show defect of title, and, on that ground, rescind the contract. The rule is well established as to ordinary sales of land, *Steinhauer v. Witman*, 1 *Serg. & Rawle*, 438, and there is no reason why a sheriff's sale should be excepted. It can never be supposed, that it was the meaning of the parties, that a valuable consideration should be paid for a defective title. "The obvious and plain rule," says YEATES, J. in *Steinhauer v. Witman*, 1 *Serg. & Rawle*, 446, "is, what was the true meaning of the contracting parties? Was it contemplated, mutually, that the purchaser should hold the land under a good right, or that he should run his chance of getting a title, and be exposed to all hazards." The sheriff's writ commands him to levy on the property of the defendant, and he has no right to put up to sale, or dispose of, a mere pretence or shadow of title. It would be a dangerous doctrine to say, that every purchaser is bound by his bid, though it turns out immediately after, that nothing can be conveyed by the sheriff. No person would bid at sheriff's sales on such terms.

2. There is no cause of action set forth in the declaration. The defendant bought according to the conditions of sale: and one of these conditions was, that if the money were not paid in ten days, the property should be resold, and the defendant charged with the difference. Instead of which, the property was never resold, but an attempt is made to deprive the defendant of the right to a resale, and to charge him with the purchase money. It was in the defendant's election to pay, or have the property resold: and as payment was refused, the duty of the sheriff was to put up the property again, and sue for the difference, if any. It does not appear, but that the property would have sold for the same, or a greater price: and thus no damage would have been sustained. The case of *Webster v. Hoban*, 7 *Cranch*. 399, is in point. It was there held, that on a sale of land at auction, if the terms be that the purchaser shall, within thirty days, give his notes with two good indorsers, and if he shall fail to comply within the thirty days, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee for a breach of the contract, until a resale shall have ascertained the deficit. The de-

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• declaration is also defective, inasmuch as it omits to state that any sale was made.

3. The verdict and judgment are erroneous. They are for more than the debt demanded. The amount beyond the demand is not found by way of damages, as it might have been, but the whole is found as debt. The plaintiff may recover less than the debt demanded, 1 *Esp. N. P.* 262, 4 *Yeates*, 283, but cannot recover more.

I. Sergeant, contra.

1. It is to be observed that the defendant is not only a purchaser with notice, but he himself was the very man who published the notice of defective title just before he made the purchase: and there were other good bidders at the sale. This introduces into the case not only the question, whether the purchaser can show defect of title, but whether he can be allowed to show it, when he knew of the defect at the time of the purchase. In *Hart v. Porter's Executors*, 5 *Serg. & Rawle*, 204, 5, the principle on which *Steinhauer v. Witman*, was decided, is stated by the *Chief Justice* to have been, that "where one party intended to convey, and the other expected to receive a good title, it is but equity, that the purchaser should have relief in case of any defect of title, although there was no express agreement to that effect. Where the intent was, that the purchaser should run the risque of title, there is not a word to be said for him: and such intention may be fairly inferred when he knew of the defect at the time of the purchase; and made no provision against it by his agreement." What then can be said for the defendant when he knew, and undertook to inform others of the defect, and yet went to bid for the property? He surely has not a scintilla of equity. But it was not, and usually it is not, the intent of the sheriff, or the understanding of these sales, that the sheriff sells any thing more than the right of the debtor, good or bad. He has no better means of knowing the title than the purchaser. The purchaser at sheriff's sale has always the advantage of buying at a reduced price, and it is a very great advantage, when there is notice of a disputed title. What is said by DUNCAN, J. in *Smith v. Painter*, 5 *Serg. & Rawle*, 225, is in point, namely, that the purchaser at sheriff's sale takes all risque: he buys on his own knowledge: and *caveat emptor* applies in all its force to him. It is said, that the deed might have shown fraud: but it was offered as appears by the notice of special matter not to show fraud or mistake, but only defect of title, and consequently that there was no consideration.

2d. The declaration taken altogether, contains a good cause of action. By the terms of sale, there were no conditions on the part of the plaintiff to be performed: that is, no conditions precedent. The defendant was to pay in ten days, which would be the 30th *December*, 1817: the deed was not to be delivered till the 16th *February*, 1818. The purchase money was to be paid before the deed was made. The defendant relies on that part of the conditions

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relative to a resale. That was merely a condition introduced for the benefit of the plaintiff, as a penalty for the defendant's non-performance of the contract of purchase, and the plaintiff may waive it, and recur to the purchase itself. In the *President, &c. of the Delaware and Schuylkill Canal Navigation v. Sansom*, 1 Binn. 70, it was determined that the Company might waive a forfeiture given by the act of assembly, and proceed upon the agreement by action.

The case of *Webster v. Hoban*, differed from the present case. That was an action for damages for nonperformance of an agreement: and, in such case, a resale might be necessary, in order to ascertain the damages. But here the action is not for damages, but for money agreed to be paid. The defendant by giving his obligation, has waived the election which he claims, even if he possessed it, and by a new contract, agreed to pay the purchase money. The defence also, is a legal one, namely, that the conditions have not been complied with. The plea of payment, with leave, lets in equitable defences, but not a legal one, which might have been pleaded. As to the omission to state a sale in the declaration, though that might have been taken advantage of on demurrer, it is now too late to object. The whole pleadings and notice, sufficiently show, that a sale was made to the defendant.

3d. The error suggested on this head, might have been amended in the court below. It appears by calculation, that the verdict was for debt and interest. So that it is merely an informal verdict, which the court may mould into form. *Ker v. Hawthorn*, 4 Yeates, 292, 3. This court, on error brought, may make the amendment which the court below ought to have made.

The opinion of the court was delivered by

DUNCAN, J. This was an action of debt on a single bill, given by plaintiff in error, defendant below, to defendant in error, for 2,310 dollars, on what the parties went to trial, on the plea of payment, with leave to give the special matter in evidence. Under this plea, the defendant gave notice of special matter, which set out the defence, the consideration for which the bill was given, and the failure of that consideration. The notice was as follows, (here his Honour read the defendant's notice of special matter). On the trial, the plaintiff gave in evidence, the bill, and conditions of sale, referred to in the bill, and proved a tender of conveyance, duly acknowledged, and a demand of the purchase money. The defendant declined receiving it, saying, "when the Sheriff made him a clear title, he would pay the money; but that he was not ready at that time;" and further proved, that at the time of the sale, the defendant read a paper, signed by *Henry Friedly, Senr.* cautioning the bidders not to bid for the property, as the title was not in *Henry Friedly, Junr.*, but in *Henry Friedly, Senr.*, and that there were many good bidders at the sale.

The defendant then offered in evidence, pursuant to his notice,

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“a deed, dated *May 24th, 1817*, from *Henry Friedly, Jr.* to *Henry Friedly, Senr.*, to shew the title was not in the defendant in the execution, as whose property it was sold.” This evidence was objected to, and was not received, and exception taken. The jury gave a verdict in debt for a numerical sum, beyond the sum demanded by the writ or declaration. The extra sum, by calculation, appears to be the interest due on the bill, and in strictness ought to have been given by the name of damages.

On the merits, besides the rejection of the evidence, the defendant below, plaintiff in error, contends, though the objection does not appear to have been made in the Court of Common Pleas, that no action could be supported, until there had been a resale, and that only for the difference, if the second sale was for a less sum.

He makes objections to the form of the proceedings; to the declaration, because it sets out no breach of the conditions of sale, or that there was a sale; shews no cause of action, or title to the money demanded; to the verdict, because the verdict and judgment are for a debt greater than plaintiff demands. The notice of the special matter is to be considered in the light of a bill in equity, to be relieved from a legal obligation, which, in conscience, ought not to bind him. It states no fraud committed on the vendor by the vendee; no misrepresentation; no concealment; no ignorance of facts; but seeks protection and absolution from his obligation, by reason of a fact not only known to him, but which he, as agent of *Henry Friedly, Jr.*, in order that there might be no pretence of a purchase without notice, publishes at the time of sale. For if he did not act as the agent of *Henry Friedly, Senr.* he would be committing a palpable fraud, in exciting apprehensions as to the title in the minds of the other bidders and thus obtaining property at an undervalue, and if he did, and afterwards bought, he would be presumed to have knowledge of the title, and to have bought confident in his own knowledge of the law. Now in such a case as this, if a man has knowledge of the fact, and acts presumptuously on his own opinion of the law, though mistakenly, if not fraudulently drawn into the mistake, that is no ground for relief in equity. I speak of sales by judicial process, and contracts between man and man, which was the case of *Steinhauer v. Witman*, 1 *Sergt. & Rawle*, 438. That case is not well understood. It does not go to the wild length, as some have supposed, that a man who purchases a title, with all its defects and imperfections, and whose conveyance contains no covenant of warranty, is not bound to pay the bonds he has given for it. For Mr. Justice YEATES, the great advocate for the departure from the general rule both of law and equity, of *caveat emptor*, in the sale of lands, yet restrains its operation; for he puts it on a very rational principle. The obvious and plain rule, he says, is, “what was the true meaning of the contracting parties; was it contemplated mutually, that the purchaser should hold the land under a good title, or that he should

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run his chance of getting a title and be exposed to all hazards," page 446. And in 447, resting it solely on the foundation of usage, he observes, "I have asserted the general understanding to have been that in all cases, unless where it plainly appeared that the purchaser agreed to run the risk of the title, either by special contract, or where it might be fairly inferred from the consideration money, being highly inadequate to the value of the premises, at the time of the contract, he might defend himself in a suit for the consideration money, by shewing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or other engagement, on the part of the vendor, that he had a good right to convey, or of quiet enjoyment, or the like covenants, or not." The nature of a Sheriff's sale, it is well known, is a sale of the defendants title. He conveys to the purchaser a free and clear estate, as fully and amply, as they were in the debtor. The Sheriff enters into no covenant. Inadequacy of price alone is no objection to a sale under process of law. 11 *Johns.* 555. The doctrine in *Steinhauer v. Whitman*, has no relation to sales by a Sheriff on executions. It is not pretended by any one, that the usage asserted and maintained by Judge YEATES extended to them. If any fraud was practised on the purchaser, or any mistake in the description, application should be made to the court at the term at which the writ is returnable to set aside the sale. I do not say, that the neglect of this would prevent a purchaser from setting up this defence to an action by the plaintiff. But the acquiescence would diminish the force of the objection, though if the court refused to set aside the sale, it might not be conclusive. But this is not a case of fraud, either alleged in the notice, or offered to be proved at the trial. The deed from *Henry Friedly* the younger to *Henry Friedly* the elder, was offered to show, that the title was not in the younger *Friedly*. The question is then reduced to this single point, can a purchaser, having direct notice at the time of sale, that the defendant in the execution, has sold and conveyed the estate before the judgment, set up that conveyance as a defence in a suit for the purchase money by the Sheriff. It is conceived, but one answer can be given to this question, that he cannot. It would obstruct the recovery of all debts, if this could be done: for by a family arrangement, friends might again and again bid in the property, and then defend themselves from payment, on the want of title. It is a mistake when it is supposed, that the Sheriff sells a sound title. He sells the claim of the defendant in the execution, and no more, as free and clear an estate as the debtor held; and the rule of *caveat emptor*, is binding on every purchaser at Sheriff's sale. Fraud, a clear mistake in the description of the property by the Sheriff, its situation, its dimensions; would raise a different question: but even in these cases, the purchaser ought not to lye by, when he has obtained the knowledge, but should move the court to set aside the sale, and under some circumstances, long delay after disco-

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very, would amount to an abandonment of the objection. One can however lay down no rule as to this. Every case depends on its own circumstances. If the defendant in the execution or judgment creditors, had been dissatisfied with this sale, on the ground that the property sold at a great undervalue, on account of the notice, a court of Justice would readily sustain the objection: for it is a most suspicious circumstance, *where the purchaser either acting for himself, or as agent for another, publishes the notice of adverse title, keeps off other bidders, and then buys himself*; but it is a defence against payment of the purchase money, by such bidder, that would not be countenanced in a court of equity, because, without giving any opinion on the purity of this particular transaction, it would open wide the door to frauds in conducting Sheriffs sales. It is better for the suitor and for the purchaser, that it should be distinctly understood, that a sale cannot be shaken, except in cases of fraud, or misdescription of the property in some material respect. It is not a just rule, that will not work on both sides. Now it would work most unequally, that a purchaser should bid in an estate at undervalue, on account of some supposed defect of title, and that he should not be bound to pay, unless the title proved good, on a trial for the purchase money; that though he bought only the title of defendant, whatever it was, still that he was not bound to pay, unless it was a clear one. There could be nothing more mischievous, than relaxing the binding nature of these sales, where they are fair. If the general rule presses hard in a particular instance, it compensates for the hardship of the particular case by its general benefit, security and certainty. It would be manifestly unequal and unjust, to release the purchaser from his bid, on account of defective title, the very cloud which diminished its value, and not to relieve the defendant in the execution, when he was able to dissipate that cloud which sacrificed his property. But the duties of both are plain: the purchaser to examine the title before he buys; the defendant at the time of sale, to show its validity, to clear up as far as he can, any objections to it. But if the purchaser will not inquire, he should suffer for his confidence: and if the defendant in the execution, will be silent and not show his title, he should suffer for his obstinacy. If the sale is a fair one, it binds both, if tainted with fraud, it binds neither, unless he is a party to the fraud. The conveyance was, therefore, properly rejected. It was irrelevant to the issue. It ought not to profit the defendant, nor injure the plaintiff.

It is very questionable, indeed my own impression, and here I only state my own impression, is, that the objection as to the resale, is not raised on the record. The court was not called to give any opinion, nor is there any evidence stated. There might or there might not be a resale; the point was not made; the bill of exceptions only brings the question of evidence as to the conveyance, and that alone before the court. But if it were before the court, we are all of opinion that the sheriff could support an action on this obligation without a resale. The case of *Webster and Ford v.*

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Hoban, 7 Cranch. 399, differs in many material respects. There it was an action on the sale itself, here it is on an obligation given for the purchase money. There the material condition was, that the purchaser should secure the purchase money, payable in 6 and 12 months, and should have 30 days to comply with the article, at which time; in case of compliance, he was to receive a good and complete title to the property, or failing to comply within 30 days, the property then to be sold on account of the first purchaser: here the whole purchase money was to be paid in 10 days, but the sheriff's deed was not to be delivered for more than one month afterwards, and then to be only a conveyance of the title of the defendant in execution. There the court held the resale on account of the purchaser would entitle him to any surplus: but here the resale was at the risk of the purchaser, and on a resale made by a sheriff for the purchaser's non-compliance, the purchaser would not be entitled to any surplus, though he would be accountable for any deficiency.

But the ground of that decision was, that the action would expose the defendant to have damages assessed against him by some uncertain, arbitrary, and unsatisfactory rule, which might be adopted by a jury, and of the advantages which were reserved to him by the terms of the auction, the plaintiff could not deprive him. But that reason does not hold here; for the action is not for damages but debt *in numero* ascertained by defendant's own obligation. Besides, the sheriff, if he had not given the obligation, might have returned the property to the next bidder, sold again, and have sued him for the difference; or might have made a special return, that the premises were knocked down to the defendant, and that he not having paid the purchase money, therefore the premises remained unsold. *Zantlinger, v. Pole, 1 Dall.* 458. Or, he might, as he has done here, return them sold, tender the conveyance, and sue for the purchase money on the obligation. For the obligation created a duty to pay, and the remedy of the sheriff was cumulative. We have now come to the two formal objections, and as the defence is not recommended to our consideration by any equity, and the plaintiff has a clear legal right, we would reluctantly send his cause back after it has been tried on its merits, on nice technical objections, not in any degree affecting the merits. But if the defence did appear to us not to be the most gracious, still, if there is uncured and incurable error, then the judgment must be reversed. And I own I was struck with the imperfection of the declaration. It sets out the conditions of sale, but does not alledge that any such sale was made. It is but the fragment of a count, and if this declaration had been demurred to, the demurrer must have been sustained. But the plea and issue and verdict cured the defect. The plea of payment admits the declaration to be good. But it is not necessary to depend on such general *dictum*; for in a much contested and well considered case in this court, *Thompson v. Musser, 1 Dall.* 460, the action was in debt in the *detinet* on a penal bill for

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200,000 pounds weight of tobacco, by which *Thompson* bound himself in the penalty of 200,000 pounds to pay 100,000. The specific error alleged was, that the declaration did not state that *Thompson* did not pay the smaller quantity of 100,000 on the day fixed for payment, so that no cause of action was shown to have accrued to the plaintiff below for the penalty. The court decided that the defect in the declaration with respect to the amount could not be taken advantage of in error, though it might on demurrer; it was cured by pleading over in chief, and by the verdict. But the notice of the special matter is to be considered as a part of the pleadings, and that states the consideration, and that a sale was made, and the obligation given for the purchase money, and in *Zerger v. Sailor*, 6 *Binn.* 24, it is stated as a general principle, "that where several things are to be done by the plaintiff, precedent to the performance of the defendant's part of the agreement, it is necessary for the plaintiff to aver performance of all that was to be done by him; *but if the performance of a part is not averred, and it appears by the defendant's plea, or by his notice under the plea, that the part in question was performed, the declaration is cured.* And the court there say, that it matters not whether the allegation be in the plaintiff's declaration, or defendant's plea, or notice: it is sufficient if it appear on the record in either.

The last objection is to the form of the verdict and judgment. The verdict is doubtless informal, for it ought to have been taken in debt for the sum *in numero* demanded, and for the rest in damages as the whole debt was found. But if we were to scan with scrupulosity the records of the courts in *Pennsylvania*, examine them with scrutinizing eyes, very few of them could bear this inspection: for in many cases we have brought before us most mishapen records. Our records are not drawn up with precision and accuracy, and the court has from necessity not exacted a rigid adherence to forms, but requires a substantial compliance with the requisites of law, and if after every reasonable allowance, this is not found in the record, the proceedings will be judged erroneous. But strict form is not now required in verdicts. It is only to be understood what the intention was, agreeably to which the verdict may afterwards be moulded into form. The intention of the jury is plain to a demonstration, to find the whole debt and the sum beyond that in interest, and the justice of the case clear, and the mode of entering the verdict is the act of the clerk, a mere clerical mistake, *Hob.* 45. 2 *Burr.* 700. *Thompson v. Musser*, 1 *Dall.* 462. And *Hobart* lays down a just rule, that though the verdict may not conclude finally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form, and make it serve according to the real justice of the case. As this might have been amended before writ of error brought, it is amendable after, and if not done by the inferior, may

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be done by the superior court, *Gilb His. C. P.* 19, 172. If the verdict is good, the judgment is likewise so; for being entered generally, if drawn at large, it may be put into form, and as the merits have been tried, justice must be obtained, without being entangled in technical niceties, *Thompson v. Musser.* 1 *Dall.* 462. This is a common error in taking verdicts in debt, and *communis error facit jus* is a maxim which ought in this instance to be respected, if in any.

Judgment affirmed.

[PHILADELPHIA, DEC. 30th, 1822.]

SLIFER and others *against* BEATES and another.

EJECTMENT.

T. F. by bargain and sale, conveyed all the parts and purparts, shares and dividends, of him the said T. F. in the messuages, lots of ground, lands, ground rents, tenements, hereditaments, and real estate, which his father lately died seised of, to two trustees, upon trust, that they and the survivor, and the heirs and assigns of the survivor, should, during the natural life of T. F. let the premises, receive the rents and income, and pay the surplus, after deducting ground rents, &c. into the proper hands of T. F. and not to any agent he might appoint, during his natural life, or apply the same to his maintenance: and from and after his decease, in trust for his children, in fee simple, and in case he left no children, then to and for the use of the right heirs of the said T. F. for ever. *Provided always*, that it should be lawful for T. F., with the consent and approbation of the said trustees, or the survivor of them, or the heirs of the survivor, by any deed under their hands and seals, duly executed and acknowledged, to grant or convey all or any part of the premises, to such person or persons, and for such uses or estates, as the said T. F. with such consent and approbation, should direct, limit, or appoint. The real estate of the father was afterwards sold by order of the Orphans' Court, and with part of the monies paid to the trustees, they purchased a house in the City of Philadelphia, which was conveyed to them on the same trusts: the residue was placed and continued at interest. T. F. made his last will (subscribed by the trustees,) reciting their approbation and consent, testified by their subscriptions to the will, and devised to his sister M. F. in fee, all the residue of his estate, after payment of debts, and died, leaving the said M. F. and the wives of the plaintiffs, with other brothers and sisters, his heirs at law.

Shortly afterwards, the trustees executed a deed to M. F., in which, as far as the same might be necessary, they gave their consent and approbation to the said devise, and conveyed the estate to the said M. F. in fee.

Held, that the power reserved by T. F. was not well executed, and that the plaintiffs were entitled to a share in the house purchased by the trustees, and in the money at interest.

On the 9th September, 1806, *Thomas Fromberger*, of Germantown, in the County of Philadelphia, executed and delivered to the defendants, a deed of bargain and sale, in consideration of one dollar, "of all the part and purparts, shares and dividend, of him the said *Thomas Fromberger*, of and in, all and singular the messuages, lots of ground, lands, ground rents, tenements, hereditaments and real estate, whatsoever and wheresoever the same might be situate, which his deceased father, *John Fromberger*, lately died seised of, or entitled to, in possession, rever-

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sion, or remainder, or otherwise however," to have and to hold the same to the defendants, upon the following trust: "that they, the said trustees, and the survivor of them, and the heirs and assigns of the survivor, shall and do, from time to time, for and during all the term of the natural life of him, the said *Thomas Fromberger*, let and demise the hereby granted premises, at and for the best rent, and upon the best terms, that can be reasonably obtained for the same, and receive the rents and income thereof, when and as the same shall come to their hands and receipt, and after first deducting all cost and expense of ground rent, and of any taxes, and repairs, and reasonable charges, to pay over the surplus thereof into the proper hands of him the said *Thomas Fromberger*, and not to any agent he may appoint, for and during all the term of the natural life of him, the said *Thomas Fromberger*, or that they the said trustees do and shall, from time to time, during the said term, pay, appropriate, and apply the said rents and income for and towards his support and maintenance. And from and immediately after the decease of him the said *Thomas Fromberger*, then in trust to and for the only proper use and behoof, of all and every the child and children of him; the said *Thomas Fromberger*, their heirs and assigns, for ever, in equal parts, as tenants in common, and not as joint-tenants. And, in case he should leave no child or children, or issue of any of them, *then to and for the only proper use and behoof of the right heirs of him, the said Thomas Fromberger, for ever. Provided always, nevertheless, that it shall and may be lawful, to and for the said Thomas Fromberger, with the consent and approbation of the said trustees, or the survivor of them, or the heirs of such survivor, by any deed under their hands and seals, duly executed and acknowledged, to grant and convey all or any part of the premises hereby granted, unto such person or persons, and for such uses or estates, as he, the said Thomas Fromberger, with such consent and approbation as aforesaid, may direct, limit, or appoint.*"

In the year 1810, the real estate of *John Fromberger*, deceased, was, by order of the Orphans' Court of the City and County of *Philadelphia*, exposed to public sale, including all the premises mentioned in the deed of 1806; when the same was sold, and a three story brick messuage in *Fromberger's Court* in the City of *Philadelphia*, hereafter referred to, was sold to *John Groves*. On the 22d of *November*, 1810, the said *John Groves*, in consideration of 3000 dollars, paid to him by the defendants, out of the monies received by them from *Thomas Fromberger's* part of the sales of his father's estate, conveyed the said house to the defendants upon the same trusts which are mentioned in the deed of 1806.

The residue of the purpart of the sales of *John Fromberger's* estate, coming to the said *Thomas Fromberger*, was received by the trustees, the defendants, or one of them, and was placed, and has been kept at interest, and so remains at this time. No trust was

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ever declared, in reference to the said personal property, unless it may be considered that the trust in the deed of 1806, is applicable to it.

On the 7th day of *December*, 1814, the said *Thomas Fromberger*, made his last will and testament, under his hand and seal, as follows:

“Be it remembered, that I, *Thomas Fromberger*, of the County of *Philadelphia*, do hereby, *with the approbation and consent of John Greiner and Frederick Beates, of the City of Philadelphia, trustees by me appointed, testified by their subscribing these presents, as witnesses to the execution hereof*, make my last will and testament, in manner following, that is to say: first, I will, that all my just debts and funeral expenses shall be duly paid and satisfied: and all the rest and residue of my estate, whatsoever, I give, devise and bequeath unto my sister, *Maria Fromberger*, to hold to her, her heirs, executors, administrators, and assigns, for ever. And I do hereby nominate and appoint her executrix of this my last will and testament.

“Lastly, I do hereby revoke all wills and testaments by me, at any time heretofore, made and published.”

The defendants did consent to, and approve the said will, and subscribed the same as witnesses. In the month of *January*, 1819, the said *Thomas Fromberger* died, unmarried, and without issue, leaving the said *Maria*, his sister and devisee, surviving, and also *Catharine Slifer* and *Sarah White*, the wives of the plaintiffs', his sisters, together with the other sisters, brothers, or their issue.

The said last will was, on the 18th of the same month, duly proved before the Register, for the City and County of *Philadelphia*, and letters testamentary thereon granted to the said *Maria*. On the 16th *February*, 1819, the defendants executed and delivered to the said *Maria Fromberger*, a deed poll of the following tenor, which was duly acknowledged on the same day, before *Andrew Petit*, an Alderman of the said city, viz: To all to whom these presents shall come. Whereas *Thomas Fromberger*, late of the City of *Philadelphia*, deceased, by a certain instrument, under his hand and seal, bearing date the 7th day of *December*, 1814, now remaining in the Register's Office for the City and County of *Philadelphia*, did give and appoint unto his sister *Maria Fromberger*, all the residue of his estate, after payment of his debts and funeral expenses, to hold to her, her heirs, executors, administrators, and assigns, for ever. Now, be it known, that we *Frederick Beates* and *John Greiner*, trustees of the estate of the said *Thomas Fromberger*, do, by these presents, so far as the same may be, on our parts, necessary and lawful, but no farther, and by virtue of all powers in us invested, as said trustees, give our consent and approbation to the said instrument of gift or appointment by the said *Thomas Fromberger*, and do hereby, so far forth as may be necessary and lawful for us, but no further, give, grant, aliene and convey unto the

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said *Maria Fromberger*, all the estate whatsoever, in the said instrument referred to: to have and to hold the same to the said *Maria Fromberger*, her heirs, executors, administrators and assigns." The questions submitted to the court were;

1st, Whether the plaintiffs are entitled to any part of the house in *Fromberger's Court*.

2d, Whether they are entitled to any portion of the personal property before mentioned.

If the court shall be of opinion with the plaintiffs, on either point, then judgment to be for the plaintiffs, and the terms of it to be settled by the attorneys; such judgment not to affect the question of the personal liability of defendants, or either of them, in any way.

Atherton & Condry for the plaintiff in error. The case turns on the proviso in the deed from *Thomas Fromberger* to the defendants: we say that the power reserved to *Thomas Fromberger* by the proviso, has not been executed. The power was to have been executed by deed, whereas he made a will, and not a deed. The nature of the instrument specified in the power must be observed. A power to revoke by deed, cannot be executed by making a will. 3 *Cruise on Real Est.* 252. *Doug.* 260. The person creating a power, may direct its execution as he thinks proper. 3 *Cruise*, 247. It is evident, that the power here reserved to *Thomas Fromberger*, was to be executed by deed: because he was to grant and convey, which could only be by deed. There was no assent of the trustees by deed, until after the death of *Thomas Fromberger*. The ceremonies directed by the person creating a power cannot be dispensed with. 3 *Cruise*, 247. Equity will not supply a defective execution in favour of a voluntary conveyance. (This was admitted by Mr. *Binney*). If a deed directed to be enrolled in a particular court, it must be so enrolled, or the power is not well executed. 3 *Cruise*, 248. 10 *Co.* 144. 1 *Co.* 173. *Digges's Case*.

It was not in the contemplation of *Thomas Fromberger*, when he made the deed of trust, that the nature of the property should be changed. The land was sold by order of the Orphans' Court, on a petition for a partition, because the inquest returned, that it could not be divided. The operation of the law, will not convert the land into money against the consent of the parties. Money ordered to be invested in land, is considered as land, and *vice versa*. This trust deed was made when the father's estate was undivided, and *Thomas Fromberger* knew that it might perhaps be sold by order of the Orphans' Court. And after it was sold, he suffered the trustees to take possession of the money. When part of the money was invested in a house, the deed was made to the same trustees, and on the same trusts.

Binney, for defendants. 1. The trust created by this deed does not embrace personal estate. 2. The power as to the real estate is well executed. 3. The use or trust limited to the right heirs of

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Thomas, is one which they must take by descent, consequently it was in him, and will pass by his will.

1. The trusts of the deed of the 9th *September*, 1806, are wholly unapplicable to personal property. That deed looked to the continuance of the paternal estate in land and houses. It did continue so four years, and was then changed by the sale under the decree of the Orphans' Court. The deed creates a trust to *lease* and nothing further, to collect the rents and pay them to him, or for his use during his life, after his death to his children, and on failure to his right heirs. The power reserved is to convey with approbation of the trustees, or survivor or his *heirs*, the whole or any part of the *premises*, for such *estate* as *Thomas* may limit, direct or appoint. No power in trustees to grant or to *sell*, or *mortgage*, or in any way convert into personalty. Whether *Thomas supposed* these trusts and the power applicable to the personal property is immaterial, for he *supposed* he could dispose of it as he has. The question is, how is the law? Now where the whole character of the fund is changed by a sale under paramount authority, and the old trusts are inapplicable to the new fund, in such a case as the present the trust is gone. There is no doubt an interest in the grantor, from whom all has proceeded, and who has parted with nothing except for a nominal consideration; but the specific trust is gone.

This, it is to be recollected, is a *voluntary* settlement, without a vested equitable interest in any one but *Thomas*. If equity were called upon to remould the trusts, after they have been broken up by the sale, at whose instance could it be asked? Suppose a house settled in this way, and sold under a prior judgment, how is the balance of sales to go? They belong to the settler, but if he does not settle them anew, who is to ask it? Is the money still land, to go to the heir, or money to go to the next of kin? Is the heir of the trustee to take it, or his executor. In *Yohe v. Barnet*, 1 *Binn.* 358, the court said it became personal property. This court has no power to settle it anew, nor to treat it as so settled. A court of Chancery would not do it between these parties. The claimants under this settlement are volunteers, and the devisee is no more. The parties are not *younger children*, nor *wife*, nor *creditors*, nor *purchaser*. In such a case equity will not act. The claimant must make out his case without the aid of chancery, or he is without relief. *Francis's Max.* 61 *Max.* 14, 15, 16. *Billingham v. Lowther*. 1 *Chan. Ca.* 243. *Anon.* 2 *Chan. Ca.* 133. *Goodwin v. Goodwin*, 1 *Chan. Rep.* 173. *Wilmer v. Kendrick*, 1 *Chan. Ca.* 159. *Goodrick v. Brown*, 1 *Chan. Ca.* 49. *Lee v. Henley*, 1 *Vern.* 37. *Fitz Edward v. Ryves*, 7 *Bro. P. C.* 417. The case is worse in *Pennsylvania*. There are no adequate powers to meet the intention of the settlement. If this personalty is to be subject to the trusts as real estate, it must be taken by the *cestuis que trust* as such. Then the sisters of *Thomas*

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should take, and not their husbands, except the profits during life. But it is clear from *Yohe v. Barnet*, that this cannot be. Then the fund should be regarded as personalty throughout, and as such not subject to this settlement. A trust must take effect according to the whole interest or not all. *Mogg v. Hodges*, 2 *Ves.* 54.

2. Has the power been well executed? There are certainly objections to it, but these are circumstances, which perhaps may be thought to obviate them. The power is reserved by and to the owner in a voluntary conveyance, and is to be more liberally construed than one to a stranger. 16 *Vin.* 470. *pl.* 19. *Sayle v. Free-land*, *Ventr.* 350. 16 *Vin.* 477. *pl.* 4. *Pollard v. Greenville*, 1 *Chan. Rep.* 185. *Gooding v. Gooding*, 1 *Eq. Ca. Abr.* 342. *Lord Hobart* says that judges should be *astute* and *subtil* to assist the intention of the parties, rather than work a wrong by enforcing rigid rules. *Hob.* 227, *Earl of Clanrickard's Case*. *Hob.* 312, *Kibbet v. Lee*. The limitation or appointment by will may be supported, because the appointment of *Thomas* is not required to be by deed, or in any particular way. The approbation and consent of the trustees are to be by deed, but not his appointment. The clause is otherwise absurd; for if he is to convey by deed, then the clause will read, "it shall be lawful for the said *Thomas* by any deed under the hands and seals of the trustees," to grant. The true reading is, it shall be lawful for the said *Thomas* to grant &c. with the consent and approbation of the trustees by any deed under their hands and seals. If this view be just, *Thomas* has well executed the power by will; he certainly intended to do it, and his will is a sufficient mode of doing it. *Powell on pow.* 57. *Sugden on pow.* 222, 224. *Kibbet v. Lee*, *Hob.* 312. *Burnet v. Manys*, 3 *Ves.* 158. If deed be not required in terms, the will is a sufficient grant or conveyance. The more difficult question is whether the consent should have been given in *Fromberger's* life. The settlement does not call for a deed of consent *eo instanti* of the appointment; and if not, he might appoint, and they consent subsequently. At common law when the Bishop could not aliene without consent of the Dean and Chapter, it was holden that such assent might be given before or after the deed of alienation, and by the same or a different instrument. *Ford's Case*, 5 *Rep.* 81. There was no necessity for making the appointment, and giving the consent by one instrument. Two will do as well. *Porter v. Turner*, 3 *Serg. & Rawle.* 115. *Earl of Leicester's Case*, 1 *Ventr.* 278. *Herring v. Brown*, 2 *Show.* 185. *Sugden on Pow.* 229. Consent after the death of *Thomas* is effectual. Where land could not pass without presentment of the feoffment by the homage at the next court, it was holden that a presentment according to the custom, after the death of the feoffer or feoffee was good. *Perryman's Case*, 5 *Rep.* 84.

3. The limitation is to the right heirs of *Thomas*. Either this was part of his old estate, which his heirs would take by descent,

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unless he devised it, or it was a trust in fee, which united to his trust for life, so as to bring in his heir in like manner by descent, though it was subject to open and let in the contingent trusts to his children. In either case, his will passes it.

It is part of his old estate, or the reversion in him after his estate for life, and the contingent uses to his children are satisfied. He might therefore devise it, settle it and the like; and his heir takes it by descent, and not by purchase. *Fenwick v. Mitford, Moor*, 282. 1 *Inst.* 22. *Earl of Bedford's Case, Moor*, 718. *Jenk. Cent.* 248. *Reade v. Morpeth, Cro. Eliz.* 321. *Fearne*, 51. The use to the right heirs of *Thomas* was executed in himself in fee.

But if this be objected to in consequence of the nature of the deed by which the settlement was made, or for any other cause, and the limitation to the right heirs is taken not as a use, but as a trust which the heirs will take as purchasers, the answer is that this cannot be, because by the same instrument there is a trust to *Thomas* for life, with which the trust to the right heirs unites, exactly as in the case of a legal estate. Whether the remainder be a use or a trust is of no consequence, because it is of the same nature as the life estate to *Thomas*, and either way unites with it, and becomes an executed trust or use in fee, subject only to open and let in the contingent estate to the children. Either way consequently the heirs would take by descent, and *Thomas* could devise it. The rule in *Shelley's case* applies where both the estates are equitable or both legal; it is only where one of the estates is legal and the other equitable, and in cases of what are called *executory* trusts, trusts resting in articles or testamentary directions which a subsequent instrument is to execute, that the two estates are kept apart, so as to make the heirs purchasers. The authorities are clear to this point. 1st. When both are trusts, or both uses executed. *Bale v. Coleman*, 2 *Vern.* 670. 1 *P. Wms.* 110. *Garth v. Baldwin*. 2 *Ves.* 646. *Wright v. Pearson, Ambl.* 358. *Fearne*, 52, 107. 2d. Where one is a trust, and the other a use executed. *Tippen v. Cosin, Carth.* 272. *Lord Say & Seal*, 1 *Ey. Ca. Abr.* 383. a case cited for the plaintiffs. *Fearne*, 58, 59 note d, citing the case of *Venables v. Morris*, 7 *D. & E.* 342. 3d Where the trusts are executory, *Trevor v. Trevor*, 1 *Eq. Abr.* 387. *Streatfield v. Streatfield, Cas. temp. Talbot*, 176. *Papillon v. Voice*, 2 *P. Wms.* 471. *Lord Glenorchy v. Bosville, Cas. temp. Talbot*, 3. *Austin v. Taylor, Ambl.* 376. *Jones v. Morgan*, 1 *Bro. C.C.* 206, *Fearne* 107, 136, 143. Consequently, as the two estates are here of the same description, they are executed, in *Thomas*, either as trusts or a use, and the heirs will take by descent. As to the intervening contingent estate, it does not prevent the union. *Lewis Bowle's Case*, 11 *Rep.* 80. The result of the whole is, that *Maria*, sister of *Thomas Fromberger* will take by his will, whether it be or be not an execution of the power of appointment.

Reply. In answer to the first point, namely, that *Thomas*

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Fromberger had power to devise this property independently of the deed of trust, it is sufficient to say that the heirs of *Thomas Fromberger*, the plaintiffs, claim as purchasers. All the cases cited are of uses executed, but the present is a case of trust. If land be given to one in trust to receive the profits and pay to another, it is not a use executed. If there be a trust estate for life, with legal remainder to the heirs of the same person, the heirs take by purchase. *Lord Say & Seal v. Jones*, 3 *Brown*, P. C. 113. 1 *Eq. Ab.* 383. *Bagshaw v. Spencer*, 1 *Vez.* 142, 147. Where the particular estate in the ancestor, and the estate given to his right heirs, are of a different nature, the estates do not unite. In all new instruments the intention is chiefly to be regarded. We agree that powers reserved by owners of estates to themselves should be construed liberally. But that rule is not applicable to a case like the present, where the owner vested his estate in trustees, in order to prevent himself from giving away or destroying his estate. If a man will improvidently bind himself by a voluntary deed, chancery will not loose his hands. Here the intent was, that *Thomas Fromberger* should exercise no power over this estate, except in the manner specified in the proviso, and if so it is immaterial what interest *Thomas Fromberger* reserved to himself. The trust deed vests the legal estate completely in the trustees; the trust to receive the rents and pay them to *Thomas Fromberger*, is a trust to be executed. It would destroy the main intent of the deed of trust if the money was not to be governed by it.

As to the execution of this power, the intent was that *Thomas Fromberger* should do nothing without the consent of the trustees, and this consent should have been given before he acted. They ought all, *Thomas Fromberger* and the trustees, to join in the same deed. The intent was that *Thomas Fromberger* should know of the consent of his trustees at the time he made the conveyance. There should be a previous consultation and irrevocable consent.

The opinion of the court was delivered by

DUNCAN, J. The facts are so clearly and concisely stated in the case submitted to the court, that it is unnecessary to re-state them.

The first question on this statement is, had *Thomas Fromberger* an interest in the estate which he could dispose of as owner? In other words, was it his own, or had he, under the conveyance, a naked power? If he continued the owner of the ultimate fee, the plaintiffs cannot recover; if he had only a power, a second question arises, has that power been duly executed in the prescribed form. A third point has been made, or rather doubt suggested, whether the sale under the decree of the Orphans' Court operated so as to destroy the subject matter of the trust, and leave that into which it was converted, money, under the dominion of *Thomas*, as if no conveyance had ever been made to the defendants. The

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plaintiffs claim under this conveyance as *cestui que trust*, from the defendants as trustees, the execution of the trusts declared. The trustees, claiming nothing for themselves, but desirous of acting as the court shall decree, interpose the claim of *Maria Fromberger*, who claims the whole estate, contending, that *Thomas Fromberger*, held the reversion of the estate undisposed of by the deed of trust, and if he did not, that he has executed the power reserved by him in that deed. This will be considered, *first*, on the granting clause, and trusts declared, without relation to the power reserved; and *secondly*, in conjunction with the proviso or restraining clause. The first is a question of considerable intricacy, and opens an extensive field of inquiry into the doctrine of uses and trusts, of limitation and of purchase. Of these doctrines it has been long since remarked, that they had been very good clients in *Westminster Hall*, and they continue to be found constant suitors in these courts. In our courts the doctrine of uses and trusts is not a very familiar one. Few cases have occurred, in which this very abstruse doctrine has been considered, and I have not, in the reports of decisions in other states, found one that has any bearing on this question. The English reports abound with them.

It is my intention to compress into as narrow a compass as is consistent with any perspicuity of argument, the observations I have to make on the driest of all subjects.

It is necessary to keep in mind, that the conveyance to the defendants was by bargain and sale, and not by covenant to stand seised to uses, or by feoffment. The effect of these instruments is very different, as we shall presently see.

There are some clear principles, which, unless I very much misunderstand them, when applied to this conveyance, are decisive in favour of the plaintiffs' construction.

First. A man cannot raise a fee simple to his own right heirs, by the name of heirs, as a purchaser, unless he parts with the whole estate. *Co. Litt. 22. a. 2 Bl. Rep. 687, and Fearn, (4th ed.) 67.*

Second. Whatever portion of the estate or use is not disposed of remains in the person who disposes, and will descend to his right heirs: for, being part of the old estate, it shall continue to go, as if no disposition had been made of it. *Co. Litt. 23. 3 P. Wms. 63. 1 Fearn 48. Sanders on uses and trusts, 101 to 105. 1 Fearn, 43. Watkins on Descent, 169.*

Third. Where the same use is limited to the owner of the estate, which would have resulted to him, in case no declaration of that use had been made, the declaration is void, and he takes it as a resulting use. *Cruise on Uses, 197.* The leading case is *Reade v. Morpeth, Cro. Eliz. 825, and Moore, 284.* (by the name of *Fenwick and Mitford.*) *Anthony Mitford*, being seized in fee of the estate, conveyed the same to the use of his eldest son *Jasper*, and *Margaret* his wife, and of the heirs male of the body of *Jas-*

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per, remainder to the use of the right heirs of *Anthony*. It was unanimously resolved, "that the use limited to the right heirs of *Anthony*, was the ancient use in him, and was never out of him, and was in him as a reversion to grant or charge, and should descend from him to his heirs, as if it had not been mentioned, and that the limitation to his right heirs was void, being no more than the law vested in him;" and this rule takes place in all conveyances to uses which operate without transmutation of possession, as a covenant to stand seized, or bargain and sale, where the use arises out of *the estate of the bargainor and covenantor*. For in these cases, so much of the use as the covenantor and bargainor does not dispose of, still remains in him, as his old estate, and is usually called a use by implication. *Cruise on Uses*, 198.

Fourth. It is a clear principle, that a use cannot be limited on a use. All subsequent uses are trusts, and as the trustees were to lease, receive the rents, pay the taxes and ground rents, make repairs, and pay only the surplus to *Thomas*, and to him in person, the legal estate was necessarily vested in them to enable them to perform the trusts. If the trusts had been, to permit *Thomas* to receive the rents, and the deed had been a deed of feoffment, the use would execute in him, and he would hold the legal estate. The cases are collected by *Sergeant Williams*, in his edition of *Saunders*, 2 *Saund.* 11. Whether the use is executed in fee simple in the trustees, (the whole use,) is to depend on the intention of the grantor, to be collected from the whole grant, and from the whole scope and plan of the instrument. A clear, definite, and unambiguous intention is demonstrable to execute all the uses in the trustees; to leave in *Thomas* no use, or remnant of the old estate, or grant to him any ulterior limitation. Maintenance for life, provision for his children, if he left any, and if he did not leave any, then to his heirs, to divest himself of every dominion and ownership, and to reserve not even a power to alter these trusts to himself, unless executed conjointly with the trustees, to effectuate this intention, could only be by vesting all the estate and all the uses in the trustees. These were all within the view of *Thomas*, and intended to be provided for by the family settlement.

Fifth. The material difference between a bargain and sale in fee, and a feoffment in fee, consists in this: the seisin of the feoffee is such as will serve a use declared to the feoffor himself, to the feoffee, or to a stranger, or to all of them; but the seisin of the bargainor can only serve the use which is bargained and sold to the bargainee, and the uses on a bargain and sale, can only be vested in the bargainee, and as such use is for a valuable consideration, bargained and sold to him, there is no possible seisin in the bargainor to serve any uses in abridgment of that previously conveyed to the bargainee; and as there can be no possibility of seisin in the bargainor after a bargain and sale, the only way that the use, sold to the bargainee, can be

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avoided or abridged is, to annex a condition of entry to the bargain and sale, on the happening of a particular event. *Sanders on Uses*, 321.

If there can be no further declaration of a use, because where the bargain and sale is in fee, the whole use is executed in the bargainee, it must follow, that there can be no resulting use. If from the nature of the instrument there can be no express use declared to the bargainee, there can be no implied or resulting use. *Gilb. Uses and Trusts*, 166, considering uses limited on uses as out of the statute, gives the reason. If a man bargains and sells his lands to A., to the use of B., the statute cannot execute the use in B.: for by the bargain and sale, which implies a consideration, there is a use in A., and before the statute it was impossible that two distinct persons should have the use of the same land, and by the statute, the first use cannot be executed in A., since there could not be two plenary possessors, and the second use being contrary to the disposition to A., must be null and void: but the chancery, that looks upon the intent of the parties in conveyances, construes A. only as an instrument to take the legal estate, and that in conscience he is bound to answer the trust to B., which he hath taken. *Cruise on Uses*, 97, is to the same effect. And *Sugden on Powers*, 10, says, the statute vests the legal estate in the bargainee, and the law will not advert to the trust declared in favour of any other, but chancery seized hold of this narrow construction, and accordingly determined, that he was in conscience a trustee, and should be compelled to convey to *cestui que trust*. The reason why on a feoffment, the feoffee is in of his reversion is, because no alteration is made of the reversion: and because the use never separates from the possession. *Moor*, 310, *Englefield's Case*. *Fearne*, in treating this doctrine, explains the cases of *Fenwick v. Mitford* and *Pybus v. Mitford*, 1 *Vent.* 372. *Penhay v. Hurrell*, 2 *Freeman*, 231, 235, 238, and 2 *Vern.* 370, and puts the question thus: "where the conveyance to uses enures by way of transmutation of possession, *as by fine or feoffment*, &c., the use should result and be implied out of the seisin of the feoffees or assignees," and says, on the strength of Lord COKE's opinion, and the concurrent authority of Lord Chief Justice HALE's opinion in *Pybus & Mitford*, that as well in a fine or feoffment, as a covenant to stand seised to uses, so much of the use as a man does not limit away, remains in himself. 1 *Fearne*, 39. So the question turns on this hinge alone; did any use remain in the owner? The whole use was executed in the bargainees. The whole estate vested in them and their heirs. There was no use executed in the bargainer by express limitation. There could be no use by implication or resulting use, for this is contrary to the very nature of bargain and sale in fee simple. A use was raised to the bargainees by the consideration; for even in a feoffment, where there is a consideration to raise a use to the feoffee, there can be no resulting use to the feoffor. It is not the case of the limitation of a

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particular estate in the use, and a remnant of the old estate limited to his own right heirs. The seisin was not the same. In fact, there was no seisin in *Thomas*: the use to the trustees fell into the possession. There is, in contemplation of law, a distinction between the legal fee, or possessory right of inheritance, and the equitable right of inheritance. A man may make a conveyance without parting with the actual possession: and though the legal right passes from him, it will be revested in him as his old use. But if he part with the legal fee, the law considers him as having another seisin.

The legal estate vested in the trustees: the law does not acknowledge the trust. But chancery acting on the consciences of the trustees, would compel them to convey to the right heirs of *Thomas*; that is, persons answering that description at his death, without children living. From all these considerations, the conclusion is manifest, that if a man absolutely part with both the legal estate and the use, an estate afterwards limited to him or his heirs, must necessarily vest in them by purchase. So, had he passed the legal estate in trust for himself or his heirs, such trust would be a new acquisition. *Watkins on Descent*, 182. We have seen, that the statute could not execute the use to *Thomas*, because the whole use was in the trustees. The case of *Fenwick & Mitford*, when its principle is fully considered, does not apply to this conveyance. Lord Coke, *Co. Lit.* 22, gives the reason of that decision; "and all this was adjudged in *Fenwick & Mitford*. For if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion in fee had been in him; because, the use of the fee continued ever in him, and the statute doth execute the possession to the use in the same plight, quality and degree, as the use was limited." But here the quality of the estate was altered. The statute could not execute the possession to the use in *Thomas*, because it was executed in the trustees, and there could not be two plenary possessors. The use was in them, and the possession fell in with the use.

A bargain and sale is a real contract, whereby a person bargains and sells his lands to another for a pecuniary consideration, in consequence of which, a use arises to the bargainee, and the statute of uses immediately transfers the legal estate and actual possession to *cestui que use*, without any entry or other act on his part. 2 *Inst.* 672. What then was the intention of the trust? No man can read the conveyance and doubt of the intention: not a manifest implication, but a positive declaration: a trust not contrary to the policy of the law. Here the trust is co-extensive with the legal estate in the land. It is to be considered as the real estate, and the trustee the legal owner, as to the *cestui que trust*, and all claiming under them. *Burgess v. Wheate*, 1 *W. Bl.* 123. The intention of the parties to the trust chiefly governs. *Bac. on Uses*, 79.

It is a doctrine of the feudal tenure, and is founded on that alone,
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that a man cannot make his right heirs purchasers. But trusts are mere creatures of confidence between party and party, and totally distinct from the legal estates, which are the subjects of tenure. They are in their nature independent of tenure, and, therefore, not the objects of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them, and, therefore, such intent can be the only guide in executing them. 1 *Fearne*, 89.

The object of this deed was, to protect *Thomas* and his children, and those who, at his death, answered the description of his right heirs, from any improvident disposition he might make. He was not intrusted to receive the rents; the trustees were to pay them personally over to him. Could it be, that he should retain the power to dispose of the estate in fee, on the event of his dying without issue? To prevent this, it was necessary that the trustees should absorb the whole estate. These purposes could only be answered by altering the whole estate. It was not a mere change of it from a legal to an equitable quality, leaving an undisposed remnant with the same estate and interest, exactly as the old estate, and disposable by the same means. For it effected a radical change, varying and restraining his disposing power. The approbation of the trustees, testified in a very formal manner, was required to any disposition of the estate, of all, and every part of the estate, which proves the intention in the approbation of the trustees. For the court will rather say, *the use is not executed in Thomas, because the approbation of the trustees is made necessary, than that the approbation of the trustees is not necessary, because it is executed in him.* *Thomas* meant that some control should be exercised over his right to dispose, and that control could be only exercised in the character of trustees; and if in the character of trustees, the legal estate, co-extensive with that power of control, must be vested in the trustees. If there was in this State a Court of Chancery, then the right heirs of *Thomas*, provided he made no valid disposition of the estate, could have filed their bills, and compelled a conveyance from the trustees; and if this had been decreed, the legal estate would have vested in them by purchase, and would not follow the old use, even had such use existed in the father. *Watkins on Descent* 133. The equitable action of ejectment is substituted for the bill in chancery, and there is a rule in equity, that whatever ought to be done, is considered as done. Where there is no Court of Chancery to compel it to be done, the rule must be adopted as a universal maxim, to prevent a total failure of justice; and very many of the titles to lands in *Pennsylvania* rest on this principle. Indeed, unless it is received in its full force, there would be an end of all our equitable system, for it is on this fiction its whole foundation rests. Even where there is a Court of Chancery to compel the act to be done, the court will consider it in that light, in favour of all those who have a right to pray it may be done. This rule is,

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that as *between the parties who stipulate what is to be done, or those who stand in their place, it shall be considered as done.* *Burgess v. Wheate*, 1 *W. Bl.* 123. This was the opinion of Sir Thomas CLARKE, Master of the Rolls, in considering this very question. All the estate and interest passed by the bargain and sale. The whole estate was made the subject of settlement: not particular estates, or particular uses. No remnant left in *Thomas*, to be disposed of by him, but all settled on the trustees. The bargainee took the whole legal estate, and all ulterior uses operate as mere trusts in equity. *Sugd. Pow.* 326.

But this is to be considered in another point of view. Admit it to be a conveyance in fee to *trustees in trust for Thomas and his heirs*, or the use executed in the trustees, as bargainees, and not in *Thomas* by the common law; "provided, that it shall and may be lawful to, and for the said *Thomas Fromberger*, with the consent and approbation of the said trustees, or the survivor of them, or the heirs of such survivor, by any deed under their hands and seals, duly executed and acknowledged, to grant and convey all and any part of the premises hereby granted, unto such person or persons, and for such uses and estates, as he, the said *Thomas Fromberger*, with such consent and approbation, as aforesaid, may direct, limit and appoint." Is there any rule of law forbidding this restraint? Powers are of two kinds, enabling, and restraining. The former is, where the owner of an estate conveys it to trustees, reserving a power to himself to revoke, alter, enlarge, or diminish the trusts declared, which power is reserved to be executed under particular circumstances only, and under certain restrictions, and it is called a restraining power, because he who is the owner of the land, and might alienate it by any mode of legal conveyance, does by the instrument by which he conveys his estate to trustees, subject to such power, confine himself not to alienate by any other means, or under any other circumstances, than those which, by the terms of the power he prescribes to himself. *Powell on Powers*, 6. He could restrain himself, and had, as owner, the right to settle it as he pleased; to order for himself. It was no matter, whether he had a reason for making it so or not, *set pro ratione voluntas*. And when he had done so, both law and reason bound him to observe it, and no court could avoid it. What was said by HALE in *Bath v. Montague*, 3 *Ch. Cas.* 107, 108, applies *ad hominem*. Besides, as he observed, "there might be a very good reason for a man to put such restraint upon himself, (and for a wise man to do so too): for a man might know the frailty of his own temper, how apt he might be, to be surprised and prevailed on to make a precipitate or inconvenient will, settlement or disposition of his estate: then, to restrain this inferiority which he was conscious of, and to prevent an inconveniency which might arise by his disposing his estate upon surprise, he would restrain himself, and settle his estate so and so. If there were a deliberate

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intention in him to alter it, he might solemnly execute such intention; he might have so many witnesses, and those of good quality, that if they found him about any such action might advise him in it, and prevent any surprise in the doing of an act that might be foolish, rash, or prejudicial.

So conscious was *Thomas Fromberger* of his infirmities, that he parted with the legal fee, the possession, to the defendants: that he reserved to himself a fair maintenance; and so little did he confide in himself, that having settled the whole estate, he would not trust himself with any power to alter that settlement, but with the consent and approbation of those whom he had made the legal owners, and that consent and approbation testified by a very deliberate act. The conveyance to the trustees was, with a manifest and plain intention to give them the whole legal estate, to support all the limitations and trusts in the deed to *Thomas*, maintenance out of the rents during his life, remainder in tail to his children, or in fee, and if he died without children, or issue of any child, living at his death, remainder, with a contingent or shifting use, to his own right heirs. The deed a mere conduit—the trustees were instruments in the conveyance, (though for the purposes of upholding the trusts, legal owners,) to conduct all the dispositions to their final consummation, to preserve and lead them along in the course marked by the deed: and equity, to whom the cognizance of trusts exclusively belongs, will never suffer a change of the trusts, where the legal estate is conferred on the trustees. *Hopkins v. Hopkins*, 1 *Atk.* 581.

The smallness of the consideration, as to vesting the whole use in the trustees, can form no objection. For any consideration, if it be the most trifling, will serve to raise a use on a bargain and sale: as five shillings, 2 *Roll. Ab.* 737, 788; or the reservation of twelve pence, 10 *Co.* 84, *A.*, or a pepper corn, 1 *Mod.* 262; 2 *Mod.* 252, are good considerations to support a use on this conveyance. Still, however, if the consideration be merely nominal, and a part of the use only be limited away, there would be a trust as to the undisposed part. But here the estate is conveyed to the trustees, to hold to them and their heirs. It is a settlement of the whole estate, in trust, which in default of appointment, is to pass to the right heirs of *Thomas*, not by way of use, nor as the reversion or reservation of the old estate by the common law, but by conveyance from the trustees. Without such conveyance, no ejectment could be supported in *England*. This clearly shows, the heirs take it not as part of the old estate undisposed of, but a new estate: for if they take it as such, they required no conveyance from the trustees. It descended to them as the legal estate, by the common law. It follows, from this view of the subject, that *Thomas Fromberger* could not change the trust, unless in the way prescribed by himself. This was a law he had put upon himself, from which, a court of law could not release him, and this legal obligation would be

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equally binding in equity, because done by his own consent. I have been more tedious than I intended, and have consumed so much time in the first inquiry, which with us, is a question of some novelty, that I must hasten over the remaining questions, which are of less general importance, and certainly of less difficulty.

It is conceded, that if the power be defectively executed, the parties being all volunteers, and standing in equal equity, chancery could grant no relief, nor remedy the defect. Nor does it make any difference, whether it is a restraint by the owner, on his own right, or a power to be executed by him on the property of others. The owner is his own legislator. He may impose on himself what terms he pleases. The province of the judge is, not to inquire whether the circumstances required are important or insignificant, essential or ceremonial, reasonable or unreasonable, but what they are. Whatever disposition *Thomas Fromberger* is empowered to make, whether by deed, will, or other writing, must be with the consent and approbation of the trustees, or the survivor of them, or the heirs of such survivor, by some deed, under their hands and seals, duly executed and acknowledged, and with such consent and approbation, he is empowered to grant and convey all or any part of the premises for such uses and estates, as he, with such consent, may limit and appoint. Where forms are imposed on the execution of a power, the circumstances must be strictly adhered to: and where a man imposes them on himself, the court cannot dispense with the forms and solemnities he has required. To do so, would be to deprive a man of the bridle he has thought proper to impose on his weakness or frailty of mind, to take from his friends the reins he has put into their hands, to restrain him in his moments of intemperance, folly, and thoughtfulness, from making beggars of his children, and stripping his heirs of that which came to him from their common ancestor. The circumstances may be perfectly arbitrary, unessential in point of effect, to the validity of the instrument by which the power may be exercised: but being required by the creator of the power, they can only be satisfied by a strictly literal and precise performance, and without recapitulating the cases in which it has been decided, there must be this literal adherence, it may be said, that in every case the ingenuity of man can devise, the terms of the power must be strictly complied with. *Sugden's Powers*, 211, 213. The material construction is, that the instrument of grant and conveyance should be by deed, and the contemporaneous and joint act, both of *Thomas* and the trustees. Their hands and seals, can refer only to a joint execution by all. The proviso cannot in any other way be rendered sensible in all its parts. For if, as to the deed, *Thomas* is not comprehended, and one of the trustess had died, it could not be executed by deed under their hands and seals. By the death of one the power would be extinct. When it is expressly declared, that the consent and

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approbation of the survivor would be sufficient, to be under their hands and seals, in that case, can mean nothing else than the hands and seals of the grantor and trustees, if both be living; if one be dead, then under the hands and seals of the grantor and the survivor. Besides, if executed by will, which is in its nature revocable, with the consent and approbation of the trustees by deed, the power would be completely executed, and at an end, there being no power of revocation in the deed. For a person only having an authority cannot annex a power of revocation, when he executes it, *Vern.* 355. An authority once well executed, cannot be executed again. *5 Mod.* 437. For where the power is executed by deed, unless a power of revocation be reserved in the deed, the appointment cannot be revoked. No, not even if the original power expressly authorised the donee in the most unlimited terms to appoint and revoke the appointment from time to time. For the law will not endure a prospective power like this, but on every execution a new power must be reserved. *2 Freem.* 61. *Hele v. Bond, Prec. Ch.* 474. A power executed by the trustees' approbation by deed, could not be revoked, and if, as here, it was coupled with an interest, it could not be revoked, unless it contained a clause of revocation. The will in its nature revocable, would thus be rendered irrevocable. But if the construction be doubtful, there are other objections to the execution of the power, insurmountable objections. For if *Thomas Fromberger* could execute the power by will, still, as to the new uses, the consent of the trustees by deed executed and acknowledged by them, is required, and this should be previous to or concomitant with the will. But it is quite clear, that the deed testifying the consent and approbation of the trustees, must be at least executed in the life time of *Thomas Fromberger*. The estate must vest according to the new uses, *eo instanti* *Thomas* died, or would go according to the old trusts. The deed giving consent and approbation must be executed in his life time, if not acknowledged. No subsequent ratification could, by relation, validate the appointment. The deed executed after the death of the appointee, which was made essential to the execution of the power, would form no part of its execution. That act could not be said to be done with the approbation by deed of the trustees, when the actor was dead before its execution. It could have no *ex post facto* operation. If subsequent ratification would validate the will, it might as well be done at the end of twenty years, as twenty days, and the estate continue in abeyance, which the law will not suffer. The appointment was, therefore, defective, and *Thomas* having no other right of disposition than the power he had reserved, and that not being conformed to, it is as if he did it without power.

In our last inquiry, the difficulty arises from the want of adequate chancery powers, and this court have, on various occasions, been distressed in the distribution of the wife's real estate, converted by the act of the law, into personal. For if the husbands of these two *feme covert*s who have brought this action, came into a Court

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of Chancery against the trustees, for the trust money arising from the sale under the decree of the Orphans' Court, that court, where there was such, would be the only tribunal.

Here there is no such authority exercised by the court. Chancery would compel a reasonable settlement on the wives. But that would be no reason why the trustees should retain the money or pay it over to the devisee of *Thomas*. For our administration of justice is not so very defective, that the money arising from the sale of real estate, settled by deed of trust, but changed into personal, by the decree of a court of competent jurisdiction, should remain without an owner, and become an escheat in the hands of the trustees. The trustees were the only hands who could receive the money on the sale. They have considered it, and now consider it as trust money. There is no difficulty in following it, and the court are of opinion, that the present plaintiffs, the husbands suing jointly with their wives, are entitled to this trust money. It is impossible to distinguish the case from *Barnet v. Yohe*. Both cases were under the same system. There, as here, had the estate remained in land, as it was the inheritance of the wife, the husband would be only entitled to a life estate. But the law having changed its character, she took; consequently, her husband took it in the character of money. The husbands would not have taken it as personal estate, if the wives had died before the sale. For at most, they would only take, as tenants by the curtesy, a life estate, the interest of the money during life, and the principal would have gone to the heirs of the wives, and not to their personal representatives. For where lands have been directed by order of the Orphans' Court to be sold for payment of debts, the widow would not be entitled to a third of the surplus absolutely, but the interest of a third during life. *Diller v. Difiedoffers' Executors*, 2 *Yeates*, 261. Yet the husband, it being personal estate in the wife's life time, would take it as personal estate. So, if the estate which the wives inherited from the father, had been sold for payment of his debts, either by the sheriff, or by order of the Orphan's Court, in their life times, the surplus money would be the husbands. So here, if *Thomas's* inheritance had been sold for payment of his antecedent debts, the money would come into the hands of the trustees, subject to the same trusts as the land was. The surplus of a real estate in trust, sold by a decree in Chancery, for payment of debts, or any other purpose of the trust, like the rents and profits, is disposed of as the original trust. It is part of the ancient trust. *Wyth v. Blackman*, 1 *Ves.* 197. An executor, who receives the surplus proceeds of land sold on an execution, is chargeable with them in account as executor, notwithstanding he is husband of the devisee, and claims to have received in that character; because it cannot be easily known what debts against the testator remains unpaid; and if paid over to the heir or devisee, and then if other debts appeared, there would be a necessity

(Slifer and others v. Beates and another.)

for new suits and executions for the purpose of selling other lands, by which the estate would be subject to heavy costs. But if there are no debts to pay, or the executor be insolvent, the court will order the surplus to be paid to the heir or devisee. *Guier, Executor of Cooper v. Kelly and wife*, 2 Binn. 298.

On a very perplexed settlement, on which a question arose, how money was to be treated, whether as money or real estate, the Chancellor said, that it was a very particular case, and an extraordinary limitation and disposition of real estate; but the court must make such construction as appears agreeable to the intention of the donor and creator of the trust; and whatever doubts there might be in the case, whether to be taken as real or personal estate, yet as all parties submit to have it considered as personal estate, not of the original donor, but of the parties, who take it under him, they may so take. And where money would in chancery be considered as land, and where there is no tenant in tail, a person *sui juris* may come into court, and have it decreed as money. But in case of a *feme covert*, it shall be laid out in land, unless some other act was done by her analogous to a fine at common law, by her coming into court to be separately examined, and then if she declared her assent to have it money, without the influence of her husband, the court would so decree it. *Cunningham v. Moody*, 1 Vez. 176, and *Trafford v. Boehm*, 3 Atk. 440. In the last case, Lord Hardwicke observed, that if the parties interested, agreed that the money should not be of the quality of land, then it was discharged of that quality. So far as respects the house in *Fromberger's* Court, the trustees have done exactly what a Court of Chancery would have directed to be done, invested the money in real estate, declaring the purchase to be with trust money for the same uses and trusts as were declared by the original conveyance and settlement. Trust money may be followed into land. Here, the house, a part of the estate conveyed to trustees, was restored to them in the character of trustees, in its original condition, and reinvested in them as their old estate. The court are of opinion, that the plaintiffs are entitled to a portion of the house and lot in *Fromberger's* Court, and to a portion of the personal estate, and that judgment be entered for them: the terms to be settled by the attorneys of the parties. So far as relates to these claimants, it matters not, whether the money be considered and treated as real or personal estate. The remote possibility of the sisters dying without issue, and without disposing of it, is of no weight.

On the first inquiry, I will add one further observation. If all the uses were executed in *Thomas*, then he would be tenant in tail, with reversion to himself in fee, and all his estate would be of the same nature, and might defeat the whole settlement. For if a person is tenant in tail, reversion in fee to himself, by a common conveyance, he may bar the entail and reversion. So that this forms an additional reason for the construction I have given to this

(Slifer and others v. Beates and another.)

conveyance. See *Trafford v. Bæhm*, 3 *Atk.* 447. And if the trust to the children was construed a use in fee, subject to a secondary, a springing use, on an event seasonably determinable, viz: the death of *Thomas* without leaving children or issue living at his death; then the right heirs of *Thomas* would not inherit by the common law, and they could not take by a shifting in *futuro* use, if the children of *Thomas* would have taken in fee simple; for no such use could be limited on a bargain and sale. For this use cannot arise out of the estate of the bargainees, they being merely *cestuis que use*, nor can arise out of the original seisin of the bargainor. For, after the bargain and sale, there could be no possibility of seisin remaining in him. *Sanders U. & T.* 155. And when a use is spoken of as arising out of the estate of the bargainor, it is where the bargainor has not parted with the fee, but only granted an estate for life. But where the bargain and sale is to the bargainee in fee, the use in the fee is executed in him, and as there can be no express use to the bargainee, so there can be no resulting use, or use by implication, as there is on a feoffment.

The distinction is very evident. For if a man bargains and sells to one for life, remainder to the first son of the bargainee, (which first son is unborn at the time of the conveyance,) this is a good limitation of the use to the first son, to take effect out of the estate of the bargainor. For in this case, the possession of the bargainor was only executed in the bargainee for life; so that the reversion in fee remained in him, out of which, he might limit the uses to the first son of the bargainee: the consideration by the bargainee, might well extend to the uses limited to his son. *Sanders, U. & T.* 324.

Whenever a declaration of uses is mentioned, it must be understood of such conveyances as operate by transmutation of possession. For from the nature of a bargain and sale in fee, there can be no further uses declared. For if, after the statute of uses, by deed of bargain and sale, one bargain and sell his lands to another in fee, for the use of the bargainee for life, or in fee, to the use of a stranger, such use limited over, would be void: because the nature of the transaction and price paid, implied therein a use to the vendee, viz: the first *cestui que use*, and, therefore, the limitation to the use of another, was repugnant; for thereby the use in fee, which was in the bargainee in respect of the consideration, would be taken out of him, and carried over to another without consideration. It, therefore, became a maxim of law, that a use or trust could not be limited out of a use or trust, before limited. Courts of law have steadily adhered to this maxim: and courts of equity seized with greediness this opportunity to re establish their jurisdiction over property, by giving effect to these uses or trusts, as affecting the conscience, and so the proper subject of jurisdiction of courts of equity. Therefore, wherever a use or trust arises out of land, there the use will be executed by the statute, and the legal estate vested.

(Slifer and others v. Beates and another.)

but where the use arises out of a preceding use, which arises out of land, there the statute will not attach, and the use is retained by equity only under the denomination of a trust. *Powell's Devises*, 288. The remainder to the right heirs of *Thomas*, gave them only an equitable estate, an equitable remainder, in which those persons who, at his death, should come within the description of right heirs, would take, and the estate executed in the trustees would support this remainder. All subsequent limitations were trust estates.

If the last limitation to the right heirs had been a legal one, the heirs must have been in by descent. But being a contingent equitable remainder, they took as purchasers, answering the description of right heirs.

Judgment for the plaintiffs.

[PHILADELPHIA, JAN. 6, 1823.]

In the case of *RICHARD NEAVES' Estate*.

APPEAL.

One devised the residue of his real and personal estate after payment of his debts, to the discretion of his executors to distribute in such manner as they might think proper, and appointed three executors, all of whom died indebted to the estate without making any distribution. *Held*, that the Register's Court might, in its discretion, appoint the son of the surviving executor, who was administrator to his father, administrator *cum testamento annexo*, he being of fair character, and having given good security, and no claim being made by any next of kin, nor opposition by the commonwealth under a claim by escheat, nor by creditors.

THIS was an appeal by *Alexander Stewart*, from the decree of the Register's Court of the county of *Philadelphia*, committing the administration *cum testamento annexo* of *Richard Neave's* estate, to *Samuel Smith*.

Ewing, for the appellant, stated, that *Richard Neave* died in *Philadelphia*, in the year 1809, and his will was proved on the 4th *March*, 1809. He left three executors, namely, *Robert Corrie*, *Francis M'Shane*, and Dr. *William Smith*, who took upon themselves the administration of the effects, and are since dead. *M'Shane* settled an account in the Register's office on the 26th *February*, 1810, having filed a declaration on the 24th same month, that the balance in his hands was 3287 dollars and 72 cents, *Corrie* died after him, namely, in *May*, 1821, having settled his account in the same office, acknowledging a balance in his hands of 2322 dollars and 73 cents. *Smith* settled no account, but filed a declaration on the 23d *February*, 1810, that he was accountable for 994 dollars, included in the inventory of *R. Neave's* estate. He died in *May*, 1822, being the surviving executor, intestate. Administration of his estate was committed to *Samuel Smith*, his eldest son. *Alexander Stewart*, the appellant, applied for the ad-

(In the case of Neave's estate.)

ministration of *R. Neave's* estate, on the ground of being a creditor of *Richard Neave*. *Stewart* had a claim on *Neave's* estate for an indemnity against expenses to which he had been put in recovering a tract of land sold to him by *Neave*, for which *Neave* had contracted with one *Richardson*. *Dr. Smith's* children claim *Neave's* estate under his will, but we say that they have no beneficial interest, but take as trustees.

Neave, by his will, devised all his estate real and personal to his executors and their heirs, directed the manner of paying his debts, and then gave, "the residue, if any, to the discretion of his executors, to distribute in such manner as they may think proper." This residue, therefore, was to be distributed by the executors, and as they have all died without executing the trust, the distribution must be made by others. A devise of copyhold to testator's wife in fee, "not doubting but that my wife will dispose of the same to and among my children as she shall please," is a trust for such children as she shall appoint. *Massey v. Sherman*, *Amb.* 520.

So where one by will gave annuities, and directed the residue of her estate to be disposed of in charity, to such persons and in such manner as her executors, or the survivors of them should appoint, it was held a trust confined to the executors personally, and that it could not be exercised by other trustees, added by the Court of Chancery to sustain the annuities. *Amb.* 309. If this residue be considered as an undisposed of surplus it goes to the next of kin. *Act of 7th April, 1807, sect. 11. Purd. Dig.* 650. *Wilson v. Wilson*, 3 *Binn.* 557. If the executors had no beneficial interest, the administrator of the surviving executor is an improper person to have the administration, because his intestate has not settled his account of *Neave's* estate. It ought to be given to some other person, who would call him to account. And we do not insist that *R. Stewart* shall be appointed, as it does not appear that he is a creditor, but that *S. Smith* shall not: and on this appeal the only question is, as to the appointment of the latter.

Chauncey and *I. Sergeant*, contra. There were applications in *Huntington* and *Bedford* counties for the administration on *R. Neave's* estate. The Register of *Philadelphia*, without notice to any person, had determined to grant letters to Mr. *McKnight* and Mr. *Stewart*; but before the letters issued, a *caveat* was entered, in consequence of which, by an old act of assembly, *June 7th, 1812, Purd. Dig.* 573 note, the matter was carried at once to the Register's Court. *Stewart* and *McKnight* swore, that they were creditors. *McKnight* afterwards relinquished his application, and *Stewart* did not prove he was a creditor. *Robert Stewart*, the father of *Alexander*, claimed 4 or 5000 dollars from *R. Neave's* estate, for indemnification of expenses at law concerning land he had bought of *R. Neave*. He had agreed to give upwards of 500 pounds for the land, of which he had paid only 50 pounds:

(In the case of Neave's eEstat.)

so that he wanted his land for almost nothing, and a large sum besides. His son was certainly a very improper person for administrator. We have his bond and mortgage for the purchase money, of which only 50 pounds have been paid. A creditor is not on the footing of the next of kin as to the administration. The next of kin has a right to the administration: but the creditor has not.

We contend, that this residue vested beneficially in the executors, and as such passed to the survivor. It is an unlimited power: no objects of distribution are named: the executors might if they pleased distribute among themselves. A devise of land to one to dispose of at his will and pleasure, is a fee. *Com. Dig. Devises, N. 4.* A bequest for such purposes as executors shall, in their discretion, think proper, does not exclude the executors. *2 Madd. 86.* There certainly is no trust for the next of kin: the whole estate is given to the executors, for the sole purpose of paying debts: and the legal estate is in the heirs of the surviving executor, Dr. *Smith*. We know of no kindred of *R. Neave*; if there are any, none have appeared. If it be supposed that there is an interest in the commonwealth by escheat, yet the commonwealth makes no objection. But there can be no escheat where there are executors. The act regulating escheats applies only to the case of the parties dying intestate. The act of 7th April, 1807, *Purd Dig. 650*, does not apply to this case, because the residue is here disposed of by will. Then the rule is well settled, that administration, generally speaking, shall be granted to the residuary legatee, and to the executor or administrator of the residuary legatee, even against creditors or next of kin. *Toller, 98, 99, 117. S. Smith*, to whom administration is granted, is a man of unexceptionable character, and has given good security in the sum of 4000 dollars. He is one of four children left by Dr. *Smith*. All those who are interested in *Corrie's* estate, and in Dr. *Smith's* estate, requested that the administration might be granted to *S. Smith*. He was within the scope of the Register's discretion, and this court will not set him aside, unless it is shown that he is unfit.

Tod, in reply. The single question is whether *S. Smith* ought to be the administrator. It is a strong objection to him, that as his father's administrator, he is indebted to *R. Neave's* estate. The accounts of the estate have not been settled: he has in his hands all the documents and papers necessary to effect a settlement: and he ought not to have the business entirely in his own hands, but power should be granted to some other, to call the executors of all the representatives to account. There can be no doubt that the testator meant that the executors should take in trust. They are to take for the purpose of distribution: they might have a discretion as to the mode of distribution, but not whether or not they would distribute at all. The word distribution, signifies in law, an apportionment among the next of kin. The executor had no idea of a beneficial interest. *Corrie* by his will orders the balance in his hands to be

(In the case of Neave's Estate.)

paid to the estate. If there are no next of kin, the commonwealth takes by escheat; for though there are executors, they may be trustees for the commonwealth. If there are no next of kin, *R. Neave* died intestate as to the residue. An administrator of an executor is not entitled to administration to the testator.^a

The opinion of the court was delivered by

TILGHMAN, C. J. *Richard Neave* died in the year, 1809, in the county of *Philadelphia*, having made his last will and testament in writing, and appointed *Robert Corrie*, *Francis M'Shane*, and *William Smith*, the executors of his said will. The will was proved on the 4th *March*, 1809. The executors, of whom *Smith* was the survivor, are all dead; and although their accounts have not been finally settled, yet it appears from the papers filed in the office of the Register of wills, that there is a balance due from each of them to the estate of the testator. It does not appear, that *Neave* left any kin. Upon the death of *William Smith*, the surviving executor, who died intestate, his son *Samuel Smith*, (his administrator,) applied for letters of administration on the estate of *Neave*, (with the will annexed.) Application was also made by *Alexander Stewart*, the appellant, upon the ground of his being a creditor of *Neave*. The Register's Court, having heard the parties, granted the administration to *Samuel Smith*, whereupon *Stewart* entered an appeal.

It does not appear, that *Stewart* was a creditor, so that he has no pretence to the administration. That is conceded by his counsel; but they contend, that letters ought not to have been granted to *Samuel Smith*, and therefore this court should revoke them. The reason they assign, is, that the executors of *Neave* took his estate in trust, and not for their own benefit, and therefore the son of the surviving executor had no right to the administration, and ought not to have it, because the estate of his father is debtor to the estate of *Neave*, and the administration would be more properly granted to another, who might call the representatives of all the executors to an account. *Neave* died seised, and possessed, of a considerable estate, both real and personal, and it is supposed that he was indebted both here, and in England where he formerly resided. He devised all his estate, both real and personal, to his executors and their heirs, gave directions as to the manner of paying his debts, and then gave "the residue, if any, to the discretion of his executors, to distribute in such manner as they may think proper." These are the words of the will. It has been argued with great force as well as ingenuity, by the counsel of *Samuel Smith*, that the executors of *Neave* took the residue of his estate, not in trust, but for their own benefit. It is unnecessary to decide that

(a) See the case of *Gibbs v. Ramsey*, 2 *Ves. and Beames*, 294: which is strong in favour of this being for the benefit of the executors themselves. *Rep.*

(In the case of Neave's Estate.)

point at present; and I will only remark, that there will be considerable difficulty in establishing a trust, where the testator has not expressly said that a trust was intended, where the object of the supposed trust is so undefined, and the power of distribution vested in the executors, is so unlimited. It cannot be said, that any person has a *right* to the administration in this case, because the statutes which direct the manner of granting administration, have not provided for it. If *William Smith*, the surviving executor of *Neave*, had made a will and appointed an executor, that executor would of course have been the executor of *Neave*. But having died intestate, there is no privity between his administrator and the executors of *Neave*. In such cases, it has been usual to grant administration with the will annexed, to some of those persons who were residuary legatees of the testator, or if there were no residuary legatees, to some of those who were interested in the estate as next of kin, or otherwise.

In the case before us there are no kin, nor was the grant of the administration to *Smith*, opposed by the creditors of *Neave*, or by the commonwealth, to whom the counsel for the appellant suppose, the residue may, perhaps, belong by escheat. It is conceded, that the administration has been committed to a person of fair character, who has given good security to the amount required by the Register's Court. Under these circumstances, it is not perceived, on what principle this court should revoke the letters. The discretion of the Register's Court, seems to have been well exercised, in a matter which the law committed to their sound discretion. The surviving executor of *Neave* had the legal property in the residue of his estate, and it certainly is by no means clear (to say the least of it,) that there was any outstanding equity against him. But if the commonwealth, or any individual, conceive that they have an equity, the administrator, with the will annexed, may be called to account. The only objection to *Samuel Smith*, which has the least plausibility is, that supposing his father to be indebted to the estate of *Neave*, it is not his interest to make up the account. But there is such a thing as carrying jealousy too far. No person has been proposed, who was better qualified. No person who had a right to be jealous, has expressed his jealousy. And it is to be recollected, that *Samuel Smith* having the possession of his father's papers, has the means of a better knowledge of the estate of *Neave*, than any other person, and consequently, will be better qualified for collecting the debts due to the estate, and repelling any unjust claims which may be brought forward against it. I am therefore of opinion, that the decree of the Register's Court should be affirmed.

Decree affirmed.

[PHILADELPHIA, JAN. 6, 1823.]

ROBBARTS Appellant *against* ROBBARTS, by her next friend
GIBSON, Appellee.

APPEAL.

An appeal lies to the Supreme Court, on a decree of divorce from bed and board, and alimony in the Court of Common Pleas, under the act of the 26th *February*, 1817.

APPEAL from the decree of the Court of Common Pleas of the County of *Philadelphia*.

On the libel of *Christiana Robbarts*, the appellee, by her next friend *James Gibson*, against *John Robbarts* the appellant, and a verdict in favour of the libellant, on several issues joined, the court below, decreed a divorce from bed and board, and alimony. From this decree, the defendant below appealed to this court.

King & Chauncey for the appellee, moved, that the appeal should be dismissed; contending, that as the act of assembly gave no appeal in such case, this court could not entertain it. The act of 13th *March*, 1815, gives an appeal in case of a decree from the bond of marriage: but the supplement, passed on the 26th *February*, 1817, to enable the court to decree divorces from bed and board, is silent on the subject. This court cannot exercise an appellate jurisdiction, not vested by act of assembly. In *Miller v. Miller*, 3 *Binn.* 30, it is observed by the court, that causes of divorce and alimony are, in general, not cognizable in common law courts: and that being a jurisdiction of a peculiar nature, vested by act of assembly, the mode of proceeding prescribed by the act, and no other should be pursued; and they refused to sustain a writ of error, because the act of assembly then in force on the subject, did not authorize it. From the silence of the legislature in the year 1817, it is to be presumed, they intended, that in cases of divorce from bed and board, the decree of the Court of Common Pleas should be conclusive. The act of 2d *April*, 1804, 4 *Sm. Laws*, 182, which was repealed by the act of 13th *March*, 1815, expressly gave an appeal to the Supreme Court, or high court of errors and appeals. They further argued, that a divorce from bed and board, differs from a divorce from the bond of matrimony, in this, that the former ceases on a reconciliation of the parties, and is, therefore, not final, but the latter is. This may have been one reason why the legislature gave no appeal in the case of a divorce from bed and board, and is sufficient to deprive the party of a remedy, which can be had only where the decree is final.

The court relieved *E. S. Sergeant* and *I. R. Ingersoll* from arguing on behalf of the appellant, and their opinion was delivered by *TILGHMAN, C. J.* The appellee, *Christiana Robbarts*, exhibited a petition on the 5th *November*, 1819, to the Court of Com-

(Robbarts, Appellant v. Robbarts, by her next friend Gibson, Appellee.)

mon Pleas for the county of *Philadelphia*, praying for a divorce from bed and board, and alimony. The court made a decree in her favour, from which her husband, *John Robbarts*, appealed. A motion has been made, to dismiss the appeal, and the question is, whether an appeal lies in this case.

On the 13th *March*, 1815, an act was passed, "*concerning divorces*," which was intended as a complete system, and repealed the former acts on the same subject. By the first section it was enacted, that "where any husband shall have, by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person, as to render her condition intolerable, and life burthensome, and thereby force her to withdraw from his house and family, it shall be lawful for the innocent and injured person, to obtain a divorce from the bond of marriage." By the twelfth section, the court was authorized to award costs, to be paid by the party against whom the decree is made, or that each party shall pay his or her own costs, at their discretion. The thirteenth section gives an appeal to the Supreme Court, in all suits or actions to be brought *under that act*. It was soon discovered, that this law was defective, inasmuch as it contained no provision for divorces from bed and board, or alimony. To remedy this omission, an act was passed on the 26th *February*, 1817, entitled, a supplement to "an act concerning divorces." By this supplement, in case of such ill treatment as is mentioned in the first section of the act of 1815, the Court of Common Pleas was authorized to grant the wife a divorce *from bed and board*, and also to allow her *alimony*; to continue until a reconciliation should take place, or until the husband should by his petition, or libel, offer to receive and cohabit with his wife again, and in such case, the court might suspend their sentence, or in case of her refusal to return to her husband, discharge and annul the same, according to their discretion. But there is no mention of an appeal to the Supreme Court, and, therefore, it is contended, that no appeal lies.

It is very true, that all these proceedings being contrary to the course of the common law, they must be prosecuted in the manner prescribed by the acts of assembly, and unless an appeal is given by these acts, it does not lie. It is true also, that this case does not come within the *letter* of the act of 1815, because the suit was brought, not under *that act*, but under the supplement. Nevertheless, it appears to the court, that the original act, and supplement, are so blended, as parts of one system, that the appeal lies in all suits prosecuted under the one or the other. So likewise may costs be given in all suits, though the supplement says nothing of costs. It was unnecessary for the supplement to give either an appeal or costs, because it was engrafted on the original law which gave both. It was objected, that a decree of alimony could not be *final*, because the husband might avoid it, by offering to take his wife home, and treat her kindly: but we do not think so.

(Robbarts, Appellant v. Robbarts, by her next friend Gibson, Appellee.)

The decree is final and conclusive, though subject to be suspended, or annulled, in consequence of subsequent acts of the husband. If he never offers to take his wife home, the decree remains in full force, and nothing further is to be done by the court. There is no reason, therefore, why it should not be appealed from. And it may be of the utmost importance to the husband, to have an appeal. The decree may be ruinous to him, by burthening him beyond his abilities. It is the opinion of the court, that the appeal lies, and therefore the motion to dismiss it is rejected.

Motion rejected.

[PHILADELPHIA, JAN. 17th, 1824.]

LEWIS and others *against* REEDER.

IN ERROR.

In a suit against the maker of a promissory note, made payable without defalcation, by an indorsee to whom it has passed for a valuable consideration, and in the course of business, evidence cannot be given by the defendant under the plea of payment, of a failure of the consideration for which the note was given, though such note be not dated in *Philadelphia* City or County, nor discounted by a bank, nor deposited in a bank for collection.

By the bill of exceptions returned in this case, to the writ of error to the Common Pleas of *Northampton* County, it appeared that this suit was brought against *John Lewis, Jonas Doan and Thomas M'Crackin*, plaintiffs in error, and defendants below, by *Absalom Reeder*, indorsee of *William Lander*, plaintiff below, upon a promissory note for 418 dollars 30 cents, drawn by the defendants below, in favour of *William Lander* or order, payable on or before the 1st *April*, 1819, without defalcation, for value received. The defendants pleaded *non assumpserunt*, and payment with leave; and under a notice of the special matter previously given, offered, on the trial, to prove that the note was given as part consideration for a messuage and lot of land, agreed to be conveyed by *William Lander* to *John Lewis*, one of the defendants, clear of incumbrances, and that *Lander*, in consequence of having no title to the same, had never been able to make, and had not made such conveyance; whereby the consideration for which the note was given had utterly failed. The note was indorsed before it became due, by *Lander* to *Reeder*, for a full and valuable consideration. The plaintiff objected to the evidence offered by the defendants, and the court rejected it. The defendants tendered their bill of exceptions.

A. Randall and *Tilghman*, for the plaintiffs in error, contended, that the court below ought to have admitted the evidence. In *Pennsylvania*, the legal effect of a promissory note depends altogether on the act of the 28th *May*, 1715, which declares, that be-

(Lewis and others v. Reeder.)

fore that time they were not indorsable, and enables the indorsee to recover the "money mentioned in such notes, or so much thereof, as shall appear to be due at the time of such assignment." *Purd. Dig.* 69. The indorsee, therefore, takes them subject to every equity to which they were liable at the time of the assignment: and this was solemnly decided by the Supreme Court, in the case of *McCullough v. Houston*, 1 *Dall.* 441, where it was held, that under this act, bonds and promissory notes are placed exactly on the same footing, except that bonds and specialties are by the act, to be assigned under hand and seal, and in the presence of two or more credible witnesses.

This case has always been considered as settling the law, and it was so taken for granted in *Stille v. Lynch*, 2 *Dall.* 194, and was recognized in *Ludlow v. Bingham*, 4 *Dall.* 62. Indeed, so firmly was the principle established, that it became necessary to pass the act of 27th February, 1797, to place promissory notes drawn in *Philadelphia*, on an equal footing with notes in the neighbouring states: and by that act, 3 *Smith's Laws*, 278, promissory notes bearing date in the city and county of *Philadelphia*, and drawn payable for value received, and without defalcation, or without set off, were to be held by the indorsee, discharged from any claims of defalcation or set off. Before that act, the indorsee of every promissory note in this state, held it liable to every set off and species of defence, legal or equitable, of which the drawer might have availed himself against the payee. *Cromwell's Exors. v. Arrott*, 1 *Serg. & Rawle*, 180. And since that act, the rule is the same, except only, as to notes drawn according to the act. The note in the present case, though expressed to be for value received, and payable without defalcation, is not dated in the city and county of *Philadelphia*, and, therefore, is not comprised within the provisions of the act of 1797. It will not be denied, that if the payee had brought this suit, the defendants might have protected themselves, by showing want of consideration: and if so, the same right exists against the indorsee. The justice and equity of the case is with the defendants, who would, otherwise, be obliged to pay a sum of money without receiving any value. There is no hardship on the plaintiff, because it is to be presumed, that all parties knew the law, that the indorsee in this state, takes such a note, as he does a bond, subject to all the equities existing between the original parties.

Scott and Hopkinson, contra. It is very clear, that by the general commercial law, the indorsee of a promissory note, cannot be affected by any equity which subsists between the maker and payee. *Chitt. on Bills*, 89, 91. No evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between an acceptor or drawer of a bill of exchange, and a third person holding the bill for value. *Collins v. Martin*, 1 *Bos & Pull.* 651. *Smith v. Knox*, 3 *Esp.* 46. *Charles v. Marsden*, 1 *Taunt.* 223. This principle is well settled in other

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states of the Union. *Baker v. Arnold*, 3 *Caines*, 279. *Brown v. Mott*, 7 *Johns.* 361. 6 *Mass.* 428. *Perkins v. Sullivan*, 4 *Mass.* 45. It would be unfortunate if *Pennsylvania* should be separated from all the mercantile world on so important a point. As to the case of *McCullough v. Houston*, it may be remarked, that commercial law was not so well understood in 1789, when that case was decided, as it has since been, and its authority has been since shaken. In *Ludlow v. Bingham*, 4 *Dall.* 63, Judges SHIPPEN and ADDISON, disputed the authority of *McCullough v. Houston*. But without impugning the correctness of that decision, it is clearly distinguishable from the present.

The note here is expressly drawn payable without defalcation. Why may not a man contract to pay the amount apparent on the face of the note, at all events, and without defalcation, and why may not such a contract be binding? The form of making notes payable without defalcation, is peculiar to *Pennsylvania*, and was adopted probably with the view to assimilate these instruments to the principles of general commercial law. So strongly has been the desire of the legislature been shown on this subject, that under the eighth section of the act regulating banks, *Purd. Dig.* 59, notes or bills discounted by the banks thereby created, or deposited for collection and falling due there, are placed on the footing of foreign bills of exchange. That a maker of a note or other instrument, may specially engage to pay the amount thereof to an assignee, without abatement or deduction, appears from the case of *Fenner v. Meares*, 2 *W. Bl.* 1269, where the obligor of a respondentia bond was held liable to pay principal and interest, to an assignee, he having engaged to pay any assignee such amount, without any abatement or deduction whatever.

The opinion of the court was delivered by

TILGHMAN, C, J. This is an action brought by *Absalom Reeder*, indorsee of *William Lander*, on a promissory note, drawn by the defendants, (who are plaintiffs in error,) payable to *William Lander*, or order, for value received, *without defalcation*. The defendants pleaded *non assumpserunt*, with notice of special matter to be given in evidence, and on the trial, offered evidence, *that the consideration of the note had failed*. This evidence was objected to by the counsel for the plaintiff, and rejected by the court. The defendants excepted to the courts' opinion, and on that exception, the cause has been argued. It was conceded by the counsel for the plaintiffs in error, that by the general commercial law, the evidence was not admissible. But they contended, that it was admissible by the act of assembly of 1715, 1 *Sm. L.* 90, by which promissory notes were made assignable, and in which it is provided, that the assignee may sue in his own name, and receive the money mentioned in the note, *or so much thereof as shall appear to be due at the time of the assignment*. The construction put upon this act, in the case of *McCullough v. Houston*, was, that the indorser

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of a promissory note, takes it, subject to all equitable considerations, to which it was subject in the hands of the original payee. The authority of this case is not now to be questioned, although it must be confessed, that it has been submitted to with great reluctance, and the general opinion certainly is, that had the point been first discussed ten years later, it would have received a different decision. It was found, however, as our commerce increased, that the principle of defalcation, was incompatible with the negotiability of paper; and, therefore, the legislature was obliged to interfere. By the act of 27th *February*, 1797, it was enacted, that promissory notes *bearing date in the city or county of Philadelphia*, whereby any person should promise to pay to another, or his order, any sum of money, for value received, and in the body of which, the words “without defalcation,” or “without set off,” should be inserted, should be held by the indorsee, discharged from any claim of defalcation, or set off, by the drawer, or indorsers thereof, and the indorsces should be entitled to recover against the drawer and indorsers, such sum as on the face of the note, or by indorsement thereon, should appear to be due. And by another act, passed the 21st *March*, 1813, (by which 40 banks were incorporated,) it is enacted, section 13, that all notes or bills, at any time discounted by any of the said banks, or deposited for collection, and falling due at any of the said banks, shall be placed on the same footing as *foreign bills of exchange*, &c. Now it is not contended, that foreign bills of exchange, in the hands of an indorsee for valuable consideration, are liable to set off, or defalcation, on account of any want of consideration; so that the anticommercial principle set up in the case of *McCullough v. Houston*, has, in most instances, been rendered harmless, by legislative provision. But there are some cases out of the purview of the acts I have mentioned, and the note in question presents one of them. For, it is neither dated in the city or county of *Philadelphia*; nor was it discounted in any of the banks, or deposited in them for collection. It must be acknowledged, that it is very desirable, the law with respect to the right of defalcation, should be placed on some certain and uniform principle, and not left to depend on the accident of a note's being discounted by a bank, or deposited in it for collection. Indeed, I consider it as the duty of this court, to put it on such footing, unless there be some act of assembly to the contrary. It comes to this question then, whether there be any act of assembly forbidding the maker of a promissory note to agree, that he will pay it without defalcation. It would be extraordinary, indeed, if there were, because, undoubtedly, such an agreement makes the note more valuable, being of more easy circulation, and no man has a right to complain of hardship, who is compelled to do no more than what he has engaged to do. Not one of our acts of assembly contain any thing like an express prohibition of such an agreement. The act of 1797, is affirmative, and declares that when an agreement

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of this kind appear in a note, bearing date in the city or county of *Philadelphia*, it shall be performed. As to all other notes, it is silent. It would, therefore, be contrary to all rules of fair reasoning, to infer an intention in the act of 1797, to make all promissory notes subject to defalcation, unless they bear date in the city or county of *Philadelphia*, whatever might be the agreement of the parties. The case of *McCullough v. Houston*, was not upon a note, *without defalcation*, and as its authority ought certainly not to be extended by equity, it has very little bearing on the case before us. The commercial law disregards form, and is bottomed on good faith. And is there not a breach of good faith, in putting paper into circulation, with an assurance on its face, that it shall be paid at all events, and then endeavouring to defeat it, under pretence of secret transactions between the maker and original payee? Between them, there is no objection to entering into the consideration of the note; because each is privy to the original transaction. But when such a defence is set up against an indorsee who has paid full value for the note, without notice of any thing which should avoid it, there is something very like fraud. I think the principle which should govern this case, has been often decided. We have held, that if the assignee of a bond, inquires of the obligor, before he takes the assignment, whether he has any thing to say against payment, and is answered, that the bond is good, the obligor shall never after be permitted to dispute payment. This is upon the broad principle of equity, which corrects the provision of the act of 1715, by which the assignee is disabled from recovering more than could have been recovered by the obligor. For, the principle which I have mentioned, I refer to the cases of *Ludwick v. Croll*, 2 *Yeates*, 464, and *Carnes v. Field & Hurlan*, 2 *Yeates*, 541. Now, to be sure, the indorsee of this note did not inquire of the maker, whether he had any objection to payment. And why should he, when he had his engagement, in the body of the note, that he would make no objection? Upon the faith of this engagement he paid his money, so that his case is within the spirit of the authorities I have cited. I will mention two other cases, very similar in principle, to the one before us. In *Fenner v. Meares*, 2 *W. Black*, 1269, A. had given a respondentia bond to B., and agreed by a writing indorsed on the bond, that he would pay the whole, principal and interest, to the assigns of B., *without any deduction or abatement whatever*: B. assigned the bond to C. for a valuable consideration and in an action on the case by C. against A., it was held, that the whole, principal and interest, was recoverable. In *Colson v. Welsh*, 1 *Esp. Rep.* 378, it was decided, that where one promises to pay a certain sum *absolutely*, he shall not be permitted to set off. I said before, that between the original parties, (the maker and the payee,) the consideration might be inquired into, although the promise was, to pay "*without defalcation*." The reason is this: the words "*without defalcation*" were introduced into pro-

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missory notes, solely for the purpose of taking them out of the principle established in the case of *McCullough v. Houston*, for the purpose of making them subject to the rules of the general mercantile law, but not to carry them beyond that law. This construction was given to them, in the case of *Cromwells Exors. v. Arrott*, 1 S. & R. 180. So that the understanding of the parties must be taken to have been, that this note should be on the footing of promissory notes in England. That being the case, there is no breach of faith in the maker's setting up a failure of consideration against the payee. But when the note gets into the hands of a third person, for valuable consideration in the course of business, the case is widely different. For then the holder looks to the face of the note, and is not bound to make any inquiry beyond it. This was the case with the plaintiff, and I am, therefore, of opinion, that the evidence offered by the defendant to prove a failure of consideration, was properly rejected. The judgment is to be affirmed.

Judgment affirmed.

[PHILADELPHIA, FEB. 10th, 1823.]

GIBBS *against* CANNON.

IN ERROR.

On a guaranty of a promissory note, drawn and indorsed by others, if the drawer and indorser are insolvent when the note becomes due, this would, *prima facie*, be evidence that the guarantor was not prejudiced, and therefore the giving him notice of non-payment, is, in such case, dispensed with. If notice be alleged in the declaration, it is not incumbent on the plaintiff to prove it.

ERROR to the District Court for the city and county of *Philadelphia*, in a suit brought by *Daniel B. Cannon*, the plaintiff below, against *John Gibbs*, in which a verdict and judgment were had for the plaintiff.

It was an action on a guaranty by the defendant of a promissory note, drawn by *John Y. Bryant*, in favour of *Mordecai Y. Bryant*, dated the 6th *March*, 1819, for 521 dollars and 33 cents, which became due on the 7th *May*, 1819. Demand had been made on the drawer, and due notice given to the indorser; but when the note was payable they were both insolvent. No notice was given to the plaintiff prior to the institution of this suit, which was on the 14th *July*, 1819. The declaration averred notice to have been given to the defendant.

On the trial, the plaintiff offered in evidence the protest of the note, to show the non-payment of the note, and notice to the indorser. It was objected to, but the court admitted it, and the defendant excepted.

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The court below charged as follows.

The defendant contends, that if the evidence should induce the jury to suppose a guaranty took place, then, it being a guaranty of a promissory note, the plaintiff, to entitle himself to recover, must show, that when the note became due and remained unpaid, the plaintiff, thereupon, or within a reasonable time thereafter, gave notice to the indorser, and to the guarantor, of such non-payment, and, by some declaration or act, made known to the guarantor, that he held him liable on his guaranty. The rule, as to notice to an indorser, of non-payment by the drawer of a promissory note, is founded on commercial law. The contract, express or implied, is, that the indorser will pay if the drawer does not; and by the commercial law, the indorser must have notice of such non-payment, as soon as, from the situation of the parties, it can be given. The contract by the indorser is not to pay at all events. But a guaranty is not a conditional contract, but an absolute engagement for the payment of the note at all events. The guarantor undertakes, not only for the solvency of the parties, but that they shall pay the note, or he will. Therefore, he is bound to inquire, and see that the note is paid. He is an actor. It results, that it is not necessary for the holder of the note to give to the party guaranteeing, notice of its non-payment. The holder, however, is, bound not to do any act, or omit to do any act, which would discharge the parties to the note, or injure the rights of the party guaranteeing against the parties to the note. Hence, the holder is bound to give notice to the indorser, or the party guaranteeing would be discharged. Of this notice, the allegation in the protest is, *prima facie*, evidence. So, the holder can do no act that will change the situation of his surety, such as giving time.

It has been urged, that on the principles of the case cited from 2 *Taunton*, notice of the non-payment is necessary. I do not think so; but if it were, the law is different in *Pennsylvania*, and even if, in common cases, it were the law, it would not be in the present instance, because the drawer and indorser were both insolvent at the time the note became due. The guarantor stands differently from an indorser. The former engages for the solvency of the parties, as well as for the payment of the note.

The defendant excepted to the charge of the court.

Scott, for the plaintiff in error, abandoned the first bill of exceptions to the protest, the point having been decided in this court, *Browne v. Philadelphia Bank, Serg. & Rawle*, 484.

As to the exception taken to the charge of the court, he contended, that the holder of the note was bound to give notice of non-payment to the guarantor, who stood in the situation of an indorser, and as notice was not given in time, the plaintiff was not entitled to recover. The note became due on the 7th *May*, 1819, and suit was brought against the defendant, *Gibbs*, on the 14th *July*, 1819, which was the first notice he had of the non-payment of the note.

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Every person is entitled to notice who is to be made liable on a note, on the default of another. In *Brower v. Jones*, 3 Johns. 230, where a creditor received from his debtor, an order on a third person, for the amount of his debt, dated 9th December, 1804, which the drawer agreed to pay in ten or fifteen days, and the order was not presented until March, or many weeks after, and in the mean time the drawer failed, it was held, that the holder had not used due diligence. In *M'Iver v. Richardson*, 1 Maule & Selw. 557., which was a case of guaranty, notice was given; as it was also in the case of *Bank of New York v. Livingston*, 2 Johns. Cas. 409. *Chitty* in his *treatise on bills*, 264, lays down the rule to be, that notice of dishonour should in general be given to a person who has guaranteed the payment of the bill. He states the same principle in page 264. In *Philips v. Astling*, 2 Taunt. 205., it was determined, that upon a guaranty given of the price of goods to be paid by a bill, due notice of the non-payment must be given both to the drawer and acceptor, unless both the drawer and acceptor are bankrupts when the bill becomes due. *Chitty on Bills*, 333, S. C. Mere insolvency of the drawer does not dispense with notice to the indorser, *Barton v. Baker*, 1 Serg. & Rawle, 334. Here the declaration states notice.

J. R. Ingersoll, contra. The allegation of notice in the declaration is surplusage: or at least it is that kind of notice which is given by the institution of the suit. The ground we rely on, as dispensing with notice of dishonour is, that it appeared that the drawer and indorser were insolvent when the note fell due. This point was determined in *Warrington v. Furber*, 8 East. 242, where it was held, that the same strictness of proof is not necessary to charge a guarantor which is necessary to support an action upon the bill itself; and that if before the bill became due, the parties liable upon it were bankrupt or insolvent, it will be *prima facie* evidence, that a demand upon them would have been of no avail, and will dispense with the necessity of giving notice. *Chitty on Bills*, 264, S. C. *Kent*, Chancellor, in *King v. Baldwin*, 2 Johns. Ch. 559, says, in speaking of a surety on a bond, the surety was a guarantor, and it is *his* business to see whether the principal pays, and not that of the creditor. He also cited *Hunt v. United States*, 2 Gall. 32. *Oxly v. Young*, 2 H. Bl. 613.

The opinion of the court was delivered by

DUNCAN, J. The bill of exceptions, on a point of evidence, has been abandoned by the plaintiff in error.

The remaining point is, the alleged error in the charge of the court.

The note, payment of which was guaranteed by the plaintiff in error, became due the 7th May, 1819; the action on this guaranty, was brought the 14th July, 1819. The action was the first notice

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he had of the non-payment. Notice in due season had been given to the indorser. When the note became due, the drawer and indorser were both insolvent.

The material question is, does a guarantor of a note, stand in the same situation with regard to notice, as parties to the note? This is not an action on the note, but on a collateral promise. Whatever vacillation prevailed in the courts for a time, it is now settled, both in *Westminster Hall*, and this court, that insolvency of the drawer of a promissory note does not dispense with the necessity of a demand of payment, and notice to the indorser. *Esdaile v. Sowerby*, 11 *East*. 114. *Barton v. Baker*, 1 *Serg. & Rawle*, 334. As between the parties to this note, the rule is inflexible, unbinding, open to no inquiry, whether notice could have availed the indorser; for the holder has no right to judge what may be the remedies of the parties, and the original implied contract being, that as far as the nature of the original security will admit, the surety, paying the debt, will stand in the place of the creditor, *Boulton v. Stubbbs*, 18 *Ves. Jr.* 21., the presumption of law is that he is injured by want of notice. Death, bankruptcy, notorious insolvency, or the drawer's being in prison, constitute no excuses, either at law or in equity; because many means may remain with him of obtaining payment, by the assistance of friends, or otherwise, of which it is reasonable the indorser should have an opportunity of availing himself; and it is not competent to the holder to show, that delay in giving notice has not, in fact, been prejudicial. *Haynes v. Birk*, 3 *Bos. & Pull.* 606. Nor will knowledge of the insolvency of the drawer, and non-payment of the note, be equivalent to due notice being given by the holder. *Nicholson v. Gouthit*, 2 *H. Bl.* 612. *Staples v. Okines*, 1 *Esp. Rep.* 332. *Esdaile v. Sowerby*, 11 *East*. 117.

In the case of *Nicholson v. Gouthit*, before referred to, the indorsement was by way of guaranty, and it was held to be liable to all the legal consequences of an indorsement. That was an action on the indorsement. But in *Warrington v. Furber*, 8 *East*. 242., where the guaranty was not by indorsement, and the action brought on the contract, Lord ELLENBOROUGH observed, that "the same strictness of proof, is not necessary, to charge the guarantees, as would have been necessary to support an action on the bill itself, where by the law merchant, a demand and refusal by the acceptor, ought to have been proved to charge any other party upon the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees, who insure, as it were, the solvency of the principal, and therefore, if he becomes bankrupt and notoriously insolvent, it is the same as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him." GROSE, Justice said, "the necessity of a demand, notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or indorser of a bill, was founded solely, on the custom

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of merchants," and LE BLANC, Justice says, "there is no need of the same proof, to charge a guarantee, as a party, whose name is on a bill of exchange, for it is sufficient against the former to show, that the holder of the bill could not have obtained the money by making a demand on it;" and LAWRENCE, Justice, "though proof of demand on bankrupt acceptors, is not necessary to charge a guarantee, yet the latter is not prevented from showing, he ought not to have been called upon at all."

In *Philips v. Aston*, 2 Taunt. 206, which was on the guaranty, not by indorsement, the acceptor was neither bankrupt nor insolvent, when the bill became due, and no steps taken to procure payment from a solvent acceptor. It was held, that this discharged the guarantor.

I think, upon a review of these cases, the line is clearly marked out. It is this: that the guarantor is discharged, if notice is not given of non-payment to him, that he may avail himself of the want of proper presentment and demand, and of due notice of non-payment, where the drawer and indorser, or either of them are solvent at the time the note became due. But when both are then insolvent, this would be *prima facie* evidence, that a demand on them, and notice to the guarantor, would be of no avail, and, therefore, the giving notice to a guarantor, not a party to the bill, would be dispensed with, the presumption being, that the guarantor was not prejudiced by the want of notice. *Chitty on Bills*, 262. It is not necessary, however, to go farther in this case than to decide, that demand having been seasonably made, on the drawer and indorser, both then insolvent, the guarantor might be resorted to for payment, without notice of the non-payment, and that he would be liable, unless he proved he was prejudiced by the want of notice. Without particularly canvassing every thing that was said by the court, by way of illustration, on the general view of the case, it is sufficient for the court to say, there was no error in the charge to prejudice the plaintiff.

There is great truth in the observation of Mr. Justice STORY, in *Evans v. Eaton*, 7 Wheat. 426, that spreading a charge *in extenso*, on the record, is an inconvenient practice, and may give rise to minute criticisms and observations upon points incidentally introduced for purposes of argument and illustration, by no means essential to the merits of the cause. And the principle laid down by the Supreme Court of the United States, in that case, is perfectly just, and ought to be applied to opinions filed under the act of assembly; that in causes of this nature, the substance only of the charge is to be examined, and if it appears on the whole, that the law was justly expounded to the jury, general expressions, which may need and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense.

It is proper to notice one objection of the plaintiff in error, that notice being alleged, it must be proved. This averment, the ac-

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tion not being on the note, the plaintiff in error being no party to it, was impertinent, not immaterial. The allegation did not relate to the point in question, the *sæpius requisitus* being sufficient, as the bringing an action is a sufficient request, in all these cases where the money is due and payable immediatly. 1 *William's Saund.* 33; and it is the duty of the guarantor to see the debt is paid. *King v. Baldwin*, 2 *Johns. Ch.* 559. Nothing can discharge the guarantor but some act done which alters his situation. 1 *Mason*, 539.

The allegation of special notice may be struck out of the declaration, as it is framed, and rejected as impertinence and surplusage. The difference is well known between immaterial averments, which must be proved, and impertinent ones which may be rejected. *Savage quitam v. Smith*, 2 *Wm. Bl.* 1106. Averment of notice is not necessary, where the matter was equally within the knowledge of the obligor and obligee. It is necessary where the plaintiff's demand arises in secret. If a man is bound to another, to indemnify him against the act of a third person, notice is not necessary to be given by the obligee to the obligor. 1 *Saund.* 116. So if a man is bound, or assumes to pay money, on the performance of an act by a stranger, notice need not be alleged; for it lies in defendant's cognizance, as well as the plaintiff's, and he ought to take notice of it. 5 *Com. Dig.* 53. So, if he assume to pay, if A. do not pay. *Ibid. Cro. Jac.* 68.

But if it were necessary to aver notice, as a condition precedent to the right of recovery, yet if there exists such matter in evidence, as dispenses with the proof of it, as here the insolvency of the drawer and indorser, this will be the same thing, as if it were proved.

Judgment affirmed.^a

(a) See *Murray v. King*, 5 *Barn. & Ald.* 165. (7 *Serg. & Lowb. Ab.* 57.)

[PHILADELPHIA, FEB. 10, 1823.]

PUSEY, Appellant *against* CLEMSON, Appellee.

IN ERROR.

If the creditor makes his debtor executor, the debt is still assets, so far as respects creditors of the testator, or a residuary legatee.

No rule can be established as to the amount of the commissions of executors, that will suit every case. In common cases, five per cent. has been fixed as the standard, by common opinion and understanding; but in the discretion of the court, it may exceed, or be less than that.

Where the value of the estate was near 100,000 dollars, and the executors had little trouble or hazard, the care of lawsuits being intrusted to counsel, who were paid by the estate, and there being more than sufficient to pay debts, and the receipts by the executors were in large sums of money, the court held three per cent. a reasonable allowance.

If an executor make a compromise of a debt, which is intended for the benefit of the estate, and has actually been for its benefit, he ought not to be charged with the debt.

Twelve dollars allowed to executors, as a fee paid to an attorney for stating and preparing their accounts, but nothing beyond that for advice as to the mode of stating it.

THIS was an appeal by *Joseph Pusey*, from the Orphans' Court of the city and county of *Philadelphia*, on the settlement of the account of *Joseph Clemson*, one of the executors of his brother *James Clemson*, deceased. *James Clemson*, by his will, made the 20th December, 1813, appointed four executors; namely, his brother *Joseph Clemson*, the appellee, *Ellis Davis*, *Charles Bird*, and *Jacob S. Waln*. *Davis* and *Bird*, renounced the executorship: *Joseph Clemson* and *Jacob S. Waln* acted, and settled separate accounts. *Joseph Pusey*, the appellant, was one of eight persons who were the residuary devisees of the testator.

On the appeal to this court, the appellant filed fourteen exceptions to the accounts settled by the appellee: but in the course of the argument, the 6th, 8th, 9th, 11th and 13th, were relinquished, and the remainder insisted upon, viz:

1st. The said executor has not charged himself with the sum of 500 dollars, with interest thereon, being the amount of a draft of said *Joseph Clemson*, dated 16th December, 1809, held by the testator at the time of his death, and due to him by the said *Joseph Clemson*.

2d. The said executor has charged the said estate with commissions at five per cent. on the sum of 10,690 dollars 49 cents; whereas, the said commissions should not have been charged at so high a rate.

3d. The said executor has charged the said estate with commissions at five per cent. on the sum of 56,138 dollars 89 cents, received by *Jacob S. Waln*, his co-executor, amounting to 2,806 dollars 94 cents, of which the said *Joseph Clemson* claims one half for himself. Whereas the services, if any, were performed by the said *Jacob S. Waln*, who has charged the said estate with the said

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sum of 2,806 dollars 94 cents, in the settlement of his account, and claims the said sum as belonging to himself.

4th. The said executor has charged the estate in his account, No. 2, with commissions at five per cent. on 7,444 dollars 36 cents; being not only too high a rate of per centage, but also, twice charged on that sum; the executor having charged a commission on it in his account, No 1.

5th. The said executor has charged the estate with too high commissions on the sum of 9,625 dollars, being the amount of sale of real estate.

7th. The said executor has not charged himself with interest on monies remaining in his hands, but has charged the estate in his account, No. 3, with interest on a certain legacy, left to him, as alleged by his father.

10th. The said executor has not charged himself with the amount of a mortgage for 900 dollars and interest, given by *Flag Bacon* and wife, to *Joseph L. Dickerson*, the amount of which mortgage with interest, was received by the executor. Said mortgage is stated in the inventory, filed by *Jacob S. Waln*, one of the executors, as belonging to the estate.

12th. The said executor has not accounted for the proceeds of five shares in the *Harrisburgh* Bridge Company, and one share in the Centre Turnpike Company, and one share in the *Susquehanna* and *York Borough*, and one bond of *J. Greenleaf*, for 1,248 dollars 70 cents, with interest, and one note of *Daniel Buckley*, for 500 dollars, all of which, are stated by the executor, as being in his possession.

14th. The appellant objects to all sums charged by the executor for stating his account, as his commissions are intended as a full compensation for performing this and other services as executor.

Ewing & J. S. Smith for the appellant.

1st exception. The executor has not charged himself with the sum of 500 dollars, and interest, due to the estate, because he contends, that his appointment as executor, operated as an extinguishment of the debt. But though this be so at law, equity will consider him as a trustee for the residuary legatee, or even for the next of kin, where a legacy is given to the executor, 3 *Gwillim's Bac. Ab.* 11. 12. *Executors and Administrators*, A. 10. There is, therefore, no extinguishment of the debt in the present case, but he is bound to account for it to the residuary legatee.

2d and 3d exceptions. The executor charges the estate with five per cent. commission, improperly in various instances.

It was here stated by the counsel for the appellee, that it was the intent of *Mr. Waln*, to charge but one half of the five per cent., so that the two executors might divide equally, between them, the commission on all monies received by them.

Ewing and *J. Smith*, then contended under this head, that five per cent. was too high a charge: it would make the commissions of

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the executors amount to the sum of 5,655 dollars 19 cents, besides what will accrue on debts yet to be collected: altogether, exceeding 6000 dollars. This is an unreasonable compensation for their services, and burdensome on the estate. There is no settled rule as to the commissions to be allowed to an executor: it must be governed by the amount of the estate, and the labour, and the responsibility incurred. In this estate there was no risk run: the estate was more than sufficient to pay all the debts. There was comparatively little trouble: there were 4000 dollars in bank, and in several suits, large sums of money were recovered. The executor has charged the estate besides, with expenses in going from home on business concerning it. Some of the property was sold at *Long Island* by an administrator, who recovered the money, and paid it over to the attorney for the residuary devisees. The amount of commission not being fixed by any rule, rests on the sound discretion of the court, and we contend, that too large a sum has been allowed, considering the amount of the estate, and the services required of the executors.

4th exception. This is founded on a plain mistake committed by the executor, in charging in his first account, a commission on his whole receipts, and stating a balance against him, and afterwards, in a second account, charging a commission again on the same balance.

5th exception. There was a sale of lands for 9,655 dollars, and the commission charged, is five per cent., which was too much. It does not appear that this money ever went through the hands of the executors. It was paid into bank, and drawn out by the different heirs, on the checks of the executors. But they had no right to receive it as executors. In fact, as there was no intestacy, the Orphans' Court had no power to order a sale.

7th exception. The executor having money in his hands, ought not to be permitted to charge interest on a legacy due to him under his father's will.

10th exception. On this exception it appeared in evidence, from a deposition, that the amount of *Bacon's* mortgage had not been received; that it was defective in consequence of not being recorded by the testator in his life time: that the executors had made endeavours to recover the money, but had failed to do so: and that in consequence of the insolvency of the debtor, they made a compromise, under which they obtained for the estate, some real property in the *Northern Liberties*.

On this evidence, the counsel for the appellant contended, that it was owing to the remissness of the executors, that the money due on this mortgage was not obtained.

12th exception. On this head, no difficulty will be made, if the executors are willing to account for the certificates.

13th exception. The question here is, whether the executors are to be allowed the charge of fees to counsel, for advice in stating

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his account. We do not object to 12 dollars, allowed as a compensation to counsel for stating the account. Advice relative to stating the account, is the executors own business, not the business of the estate, and is compensated by the commission he receives. It is a matter between him and the estate, and not a business of the estate. For the latter, many allowances are made for counsel's fees in these accounts, and not objected to.

P. A. Brown and Binney contra.

1st exception. The court ought not in this way, to decide on this objection, but to leave it open to a suit at law. If the court do decide, they must decide it as a court of law, and not as a court of equity: in which case it is clearly extinguished. *Roll's Ab.* 920, 921. 2 *Bl. Comm.* 511. *Co. Lit.* 264. 1 *Salk*, 299. *Sir W. Jones*, 345. *Hob.* 10. *Thomas v. Thomson*, 2 *Johns.* 421.

2d, 3d, 4th, and 5th exceptions. The question as to the amount of commissions proper to be allowed to executors, is a difficult one, much contested, and on which there is no standard to refer to. In deciding it, regard should be paid to custom, because executors and administrators expect what is usually allowed, and are induced by that expectation to undertake the trust. The general rule in *Philadelphia*, has been, to allow five per cent. The records of the Orphans' Court, from 1813 to 1821, have been searched with a view to this point, and 436 accounts in all, have been examined. In these, less than five per cent is allowed in 40 cases: in 394 cases, five per cent., or more. So that nine tenths of the accounts have passed with an allowance of five per cent. This is sufficient to constitute a general rule, which ought not to be departed from without particular reasons. In this particular case, the testator had somewhat more than 4000 dollars in bank: the rest of his personal estate consisted of bonds, notes, &c. He had some mortgages, all of which were in dispute. A very considerable portion of the estate, amounting to 37000 dollars, was collected by suit: a considerable part of which, has been paid by the executors, namely, 27000 dollars, after suit: and they have successfully defended several suits. Not less than fifteen suits were instituted by and against them. There was business in several states, and they made a voyage, by sea, to *Moose Island*, and journeyed back by land. The responsibility of executors is a very serious consideration: a mistake in judgment, might make them liable to the residuary devisees. As to the commission on land sold by order of the Orphans' Court, there is no reason why it should be less than five per cent.

7th exception. We grant, that if the executor had money in his hands, he had no right to charge interest on the legacy.

10th exception. The first security proved bad, and an attempt was made by the executors to change it for a better. It was done with the advice of counsel: and though it miscarried, it was done with a view to the benefit of the estate. Where executors act

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with due diligence, and with honest intentions, they are not responsible for accidental losses. In *Blue v. Marshall*, 3 P. Wms. 387., the administrator released the arrears of rent to an insolvent tenant, who, in consideration thereof, gave up his lease: yet it being done for the benefit of the estate, he was held not chargeable with the arrears. In 7 *Johns.* 411., the same principle is decided. In the *People v. Pleas*, the case of *Blue v. Marshall*, is cited and recognized. In *Thompson v. Brown*, 4 *Johns. Ch.* 625, it is said, that trustees acting *bona fide*, are always favoured. If the court have doubts as to the propriety and fairness of the executor's conduct, it would be proper to direct an issue to determine it.

12th exception. We have the stock in specie ready to deliver up.

14th exception. It is as proper that an executor should be allowed for money paid for advice in stating the account, as for actually stating it. He is not supposed to be sufficiently conversant in the law, to enable him to make up the account safely, without legal assistance. It is in the execution of the trust: an indispensable branch of it: and, we conceive, a proper item of charge.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an appeal from the Orphans' Court, on the settlement of the account of *Joseph Clemson*, one of the executors of his brother *James Clemson*, deceased. *James Clemson* appointed four executors, viz. his brother *Joseph Clemson*, *Ellis Davis*, *Charles Bird*, and *Jacob S. Waln*. *Davis* and *Bird* renounced, and *Joseph Clemson* and *Jacob S. Waln*, acted, and settled separate accounts. *Joseph Pusey*, the appellant, is one of the residuary devisees of *James Clemson*, the testator. Fourteen exceptions were taken to the settlement of the account in question, of which the 6th, 8th, 9th, 11th, and 13th, have been relinquished. All the others the appellant has endeavoured to support.

1. The appellee has not charged himself with a debt of 500 dollars, and the interest thereon, which he acknowledges to have been due from him to the testator, because he supposes that the debt was extinguished by the appointment of him as an executor. In this he is clearly mistaken. When a debtor is appointed executor, the debt is extinguished *in law*, because he cannot bring suit against himself. But it is assets, and as such, he is accountable for it to *creditors*. And where, as in this case, the testator has devised the residue of his estate to *others*, the executor is considered *in equity*, as a trustee for the residuary devisee, to the amount of the debt due from him. The case has been carried even further. For where the testator gave legacies to his brother and nephew, who were indebted to him in different sums, and appointed them executors of his will, and made no disposition of the residue, these debts were declared to be a trust for the next of kin, the

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Lord Chancellor observing, "that he thought it a settled point in the Court of Chancery, that the appointment of the debtor executor, was no more than parting with *the action*." *Bac. Ab. Appen. vol. 1 p. 533, a. No. 10.* *Joseph Clemson* must therefore be charged with this debt and interest.

The 2d, 3d, 4th, and 5th exceptions, are to the allowance of a commission of 5 per cent. to the executor, on the whole amount of the money received by him. The 4th exception is admitted to be good, as it points out a palpable error in the charge of commission, and shows what little consideration this account must have undergone in the Orphans' Court. The executor settled two accounts. In the first, he was allowed a commission of 5 per cent. on his whole receipts, and a balance of upwards of 5000 dollars, which appeared against him, was carried to his second account. In this second account, in which the estate was credited with the balance of the first, the executor was allowed a commission of 5 per cent. on the balance, as if it had been money received by him. This was a plain oversight both in the accountant and the court, and must now be rectified. The other three exceptions to the allowance of 5 per cent. commission, require very serious consideration. It is a subject on which there has been great difference of opinion. And it is no wonder: for the law has fixed no certain compensation, nor is it possible for the court to establish a rate of commission which shall do justice in all cases. An executor should receive a compensation adequate to his care and trouble, besides a liberal allowance for all necessary expenses. But it would be debasing the sanctity of the trust, to consider it as an *office of profit*. It is an honourable duty, which ought not be undertaken from motives of mere gain. Still, it is not to be expected, that executors should sacrifice their time, and subject themselves to hazard, without some remuneration. But the difficulty is in fixing the quantum. It is very desirable, both for the sake of the executors, and the family of the testator, that there should be some standard to which both may look, on the subject of commissions. And in the cases which generally occur, it appears to me, after considerable research, that the common opinion and understanding of this country, has fixed upon 5 per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates, where the total amount is small, and that too, collected in dribblets. In such, 5 per cent. would be insufficient. On the contrary, there are others, where the total being very large, and made up of sums collected and paid away in large masses, 5 per cent. would be too much. It must be left to the discretion of the courts, to ascertain those cases in which the general rule should be departed from. The personal care and anxiety of the executor, is a fair subject of consideration. An estate not equal to the payment of its debts, is always attended with hazard, which should not be forgotten in fixing the compensation. I have carefully examined the ac-

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count on which the present dispute arises, and am of opinion, that it should be considered as an excepted case. In order to explain the reasons on which this opinion is founded, I shall consider the separate accounts of the two executors, as one. On the subject of commissions, there is no difference between them. Both depend on the same principles; and I understand, that the executors themselves consider the aggregate of the commission in both accounts, as *a whole*, to be equally divided between them. In the first place then, we perceive an estate, which at a round sum, may be called 100,000 dollars. In the next place, there was no hazard of a *devastavit* from misapplication of assets, through ignorance of the law; the estate being much more than equal to the debts of the testator. There have been law suits in which large sums have been recovered. But the trouble has fallen principally on the counsel employed for the executors, for whose reward, a very liberal allowance has been made. All the expenses of the executors have also been paid, over and above their commissions. But what weighs most with me, is the manner in which the money came to the hands of the executors. In order to show that the trouble was remarkably little, I must enter into some detail. *Joseph Clemson* reserved about 12,400 dollars, of which about 9400 consisted only of *five items*. He took goods of the estate at the appraised value, amounting to about 500 dollars, and received the residue of the 9,400 dollars, in four payments, each of which was above 1200 dollars, and one of them 4,925 dollars. In looking into *Jacob S. Waln's* accounts, we find, that in his first account, amounting to 58,000 dollars, and upwards, he received more than 49,000 dollars in large payments. There were four payments, of between 1,500 and 3,000 dollars each, six of between 4 and 8,000 each, and one of 10,000 dollars. In his second account, amounting to 35,000 dollars, and upwards, the receipts are likewise in sums uncommonly large. There are other circumstances against a large commission in this case. There was a sale of real estate, which cost but little trouble to the executors, and a remittance to them of the proceeds of a mortgage in *New York*, which cost still less. Moreover, the estate has been burthened with very considerable sums paid to agents and attorneys who have had all the trouble of collecting large debts, and the executors have in some instances had little to do but to receive the money. Such accounts occur but very rarely. If in general, 5 per cent. may be deemed a reasonable allowance, it certainly cannot be so here. Considering all circumstances, it appears to me, that 3 per cent. would be quite sufficient, and that is the rate at which I am of opinion it should be fixed.

7. The 7th exception is, "that the executor has not charged himself with interest on monies remaining in his hands, but has charged the estate with interest on a certain legacy, left to him, as he alleges, by his father's will." If the fact be so, it is an error which must be corrected. The accounts must be examined, before

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our decree is drawn up, and this exception will then be attended to.

10. The 10th exception is, "that the executor has not charged himself with the amount of the mortgage for 900 dollars, and interest, given by *Flag Bacon and wife*, to *Joseph L. Dickerson*, the amount of which mortgage, with interest, was received by the executor." The appellant has not made good his assertion, that this money was received by the executor. Nothing like it has been proved. On the contrary, it is evident, that it has not been received, and the appellant has shifted his ground, and endeavoured to throw the burthen of this debt on the executors, on account of their negligence. But the charge of negligence has not been proved to the satisfaction of the court. It appears that the mortgage was defective for want of being recorded; and this defect existed in the life of the testator. In that respect, there is nothing to blame in the conduct of the executors. It appears too, that pains have been taken to recover the money, but without success. And finally the executors despairing of a recovery, by reason of the insolvency of the debtors, made a compromise to the best of their judgment, by which they have secured to the estate of the testator, some real estate in the *Northern Liberties of Philadelphia*. If the compromise was intended for the benefit of the estate, and has actually been for its benefit, (and from the evidence, I incline to think that such was the case,) the executor ought not to be charged with the debt. This principle has been sanctioned in Chancery, in the case of *Blue v. Marshall*, 3. *P. Wms.* 381., and *The People v. Pleas, &c.* 2 *Johns. Cas.* 378. I am of opinion, therefore, that this exception has not been supported.

12. The 12th exception relates to sundry shares in the *Harriburgh Bridge Company*, *Centre Turnpike Company*, and *Susquehannah and York Turnpike Company*. There is no dispute on the subject of this exception. The executors acknowledge that they have the certificates for these shares, and are willing to account for them.

14. The 14th and last exception is, to the sum charged by the executors for fees paid to counsel for advice as to the mode of stating the account. There is no objection to the charge of twelve dollars, paid to an attorney for stating and preparing the account. Whoever examines the account will find, that very liberal allowances have been made to the executor, for fees paid to counsel, on the *business of the estate*. As to *stating the account* which is to be exhibited to the Register of wills, it has been usual to make a small allowance to the executor, because, he is not supposed to be conversant of the form in which it is to be drawn. But he may want advice for his own satisfaction, which may not be for the benefit of the estate, and with which therefore the estate ought not to be burthened. I have known many instances, where executors have endeavoured to avail themselves of the advice of counsel, for their own benefit, and to the prejudice of the estate. In the present instance,

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I think twelve dollars sufficient for any assistance of which the executor was in need, *in stating the account*. Beyond that sum, therefore, the exception is allowed.

These are the principles, on which the court will decree in this cause, and the account must be rectified so as to be conformable to them.

[PHILADELPHIA, FEB. 10, 1823.]

HAMPTON *against* SPECKENAGLE.

IN ERROR.

In an action by the vendor for non performance by the vendee of a contract to purchase real estate, the vendor in making out his title, cannot give in evidence, a Sheriff's deed, without showing the judgment and execution.

An exemplification of proceedings in the Orphans' Court, to value and make partition of real estate is not evidence, unless the whole record is exemplified.

If before the day for accepting the deed under a contract of sale, the vendee deny that he had made the purchase, and makes no other objection, that dispenses with the necessity of the tender of a deed by the vendor on the day.

But though before the day, the vendee deny that he had made the purchase, yet if the land is subject to incumbrances not declared at the time of the sale, the vendor must satisfy the jury beyond a doubt, that he could and would have removed the incumbrances, or he is not entitled to damages.

If an agent, employed to bid for the vendor at a public sale at a limited price, exceed his authority, he is considered as making the purchase on his own account, and may be sued as a purchaser.

A declaration in assumpsit by a vendor on a contract of sale of real estate, ought to state a positive assumption by the defendant, and if the vendor contracted to make a good title, that he was seised of a good estate in fee simple.

It seems a general averment, that the plaintiff was ready and willing, and offered to perform his part of the contract, is good after verdict.

ERROR to the District Court for the city and county of *Philadelphia*, in assumpsit, brought by the defendant in error, the plaintiff below, *William Speckenagle*, against *Alexander Hampton*, to recover damages for not complying with an alleged contract of sale of real estate in *Bucks County*.

The declaration stated in the first account, that whereas heretofore, to wit, on the first *January*, 1814, a certain conversation was had and moved by and between the said *Alexander* and the said *William*, wherein the said *William*, in consideration of the promise and undertaking of the said *Alexander*, to pay him the sum of 3,500 dollars on the 1st *April*, 1817, and the balance of the purchase money in three equal annual payments, with lawful interest, agreed and undertook to sell and convey to the said *Alexander*, a certain house, barn, and plantation of him the said *William* in *Bristol Township*, *Bucks County*, containing 112 acres, and to give a good title and possession of the same, on the said 1st of *April*, 1817; and the said *Alexander*, in consideration of the afore-

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said agreement and undertaking of the said *William*, then and there undertook, and faithfully promised, to pay for the said estate, the sum of 89 dollars and 50 cents per acre, whereof 3,500 dollars should be paid on the 1st *April*, 1817, and the remainder in three equal annual payments, with lawful interest, from the delivery of the deed, with satisfactory security. And the said *William* in fact, saith, that afterwards, to wit, on the said 1st *April*, 1817, at the county aforesaid, he was ready and willing to give a title and possession of the said estate, to the said *Alexander*, and did then and there offer and propose to the said *Alexander*, so to do, and was then and there, and at all times, ready and willing, (and did then and there offer and propose,) to do, execute, and perform all things whatsoever, which, by his undertaking aforesaid, he had agreed to do, and did then and there perform and execute the agreement upon his part, and did then and there require of the said *Alexander*, the performance and fulfilment of the said undertakings on his part to be fulfilled, and especially to pay to the said *William* the sum of 3,500 dollars, and to secure the payment of the remainder, agreeably to his promise aforesaid. But the said *Alexander*, did not then and there pay the said sum of 3,500 dollars, or any part thereof, and did not then and there secure the payment of the remainder, and did not then and there perform and fulfil his agreement so as aforesaid made, but did wholly neglect and refuse so to do. Whereby the said *William* hath been damaged to the amount of 10,000 dollars.

The second count stated, that whereas also, on the 26th *December*, 1816, at the county of *Philadelphia* aforesaid, the said *William* was the owner of a certain house, barn and plantation, containing 112 acres, in *Bristol Township*, *Bucks County*, and then and there offered and proposed to sell the same at public sale, upon the terms and conditions following, that is to say, the highest and best bidder to be the purchaser, who must pay 3,500 dollars on the 1st day of *April* next, when a good title and possession will be given: the remainder to be paid in three equal annual payments, with lawful interest from the delivery of the deed, with satisfactory security for the same: there is a mortgage on this place of 1300 dollars, which is to remain on the place during the life of widow *Broadnax*: the grain in the ground is excepted. And whereas the same being exposed to sale, the said *Alexander* did then and there become the purchaser of the said house, barn, and plantation, he being the highest and best bidder for the same: and the said *Alexander* did then and there acknowledge himself the purchaser of the above property, at 89 dollars 50 cents per acre, agreeably to the above conditions, whereby the said *Alexander* became, and actually was liable to pay to the said *William*, the sum of 10,024 dollars, in the manner and proportions above set forth. And the said *William*, in fact saith, that he was then and there ready and willing, and did offer and propose to the said *Alexander*, to fulfil and per-

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form the terms of his said agreement, and did then and there require and demand of the said *Alexander*, to fulfil and perform the terms of the agreement on his part to be fulfilled, and performed; but the said *Alexander* did not then and there perform and fulfil the agreement, so by him undertaken, but wholly and entirely neglected and refused so to do, and did not then and there, to wit, on the said 1st *April*, 1817, pay the sum of 3,500 dollars aforesaid, and did not give then and there satisfactory security for the payment of the remainder as aforesaid, although so to do he was required as aforesaid, by the said *William*, to wit, the day and year aforesaid, at the county aforesaid, whereby the said *William* alleges he hath sustained damage to the amount of 10,000 dollars, and and therefore, he brings suit, &c. The defendant pleaded non assumpsit and payment.

On the trial, it appeared, that the defendant had bid for the place at 89 dollars 50 cents per acre, and had signed the conditions of sale stated in the second count: but the defence was, that the defendant had purchased the property at that price as agent for the plaintiff, who had limited the price of the farm at 90 dollars per acre, and procured the defendant to buy in the property for him, if it would not bring that sum. The defendant further contended, that if he were liable as purchaser, yet the plaintiff was not entitled to enforce the defendant's performance of the contract, because the plaintiff had not tendered a deed for the property on the 1st *April*, 1817, and, moreover, that the farm was incumbered with mortgages and other liens, not disclosed at the sale, exceeding the whole purchase money, so that the plaintiff could not have made a clear title. The plaintiff alleged in reply, that the defendant, before the 1st *April*, 1817, declared, that he would not comply with his contract, excused the plaintiff from tendering a deed, or from attempting to clear off the incumbrances.

The plaintiff in showing his title to the land, offered in evidence a deed for the land from *William Chapman*, Sheriff of *Bucks* County, dated the 4th *February*, 1793, to *William Broadnax* and *Timothy Titus*, in fee, reciting two judgments and writs of *levari facias* upon mortgages, under which the Sheriff had made a sale. To this evidence the defendant objected, because the judgments and executions were not produced. But the court overruled the objection, and admitted the evidence, and the defendant tendered a bill of exceptions.

The plaintiff further offered in evidence, an exemplification from the records of the Orphans' Court of *Bucks* County, to show certain proceedings respecting the valuation and partition of the real estate of *William Broadnax*, deceased. By this exemplification it appeared, that in pursuance of the order of the court, seven persons had viewed and valued the real estate of *William Broadnax*, and divided it among his heirs, and that their proceedings being returned to the court, were by them confirmed. But it did not set

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forth any petition or statement of facts, on which these proceedings were had. The defendants objected to this evidence, but the court admitted it, and sealed another bill of exceptions.

The third bill of exceptions was taken by the defendant to the answers of the court to certain points, on which they were requested to charge the jury, which were as follows:

1st, That the plaintiff in this case cannot recover, inasmuch as he never executed or tendered, or offered to tender a deed to the defendant for the property, for the alleged breach of contract of sale of which this suit is brought.

Answer of the court. The tender of a deed by the plaintiff, was not necessary in this case, as the action was not brought for the purchase money, but for the non performance of the contract by the defendant; and the defendant, upon the evidence, if credited by the jury, had refused to take the purchase, or comply with his contract, before the day limited for making the title, and delivery of possession.

2d, That the defendant was not bound to complete his contract, and take the property, from the circumstance of the incumbrances existing unsatisfied on the property before, at, and after the time the deed was to be completed; and that under such circumstances, no action can be maintained for the breach of the contract of sale.

3d, That inasmuch as there were existing incumbrances on the property, not mentioned in the conditions of sale, the defendant was not bound to take the property at all; and that the circumstance contended for by the plaintiff, that the defendant did not object to the incumbrances at the time the contract was to be completed, does not at all alter the law in this case.

Answer of the court. The incumbrances were not the cause assigned by the defendant for his refusal to perform the contract on his part, nor made the ground of objection; and he had upon the evidence, if credited by the jury, refused to take the purchase before the time limited for making the deeds and discharging the incumbrances.

4th, That if the defendant acted as agent of the plaintiff in this case, and exceeded his authority, the plaintiff has mistaken his remedy, and this action cannot be maintained.

5th, That the jury must be satisfied from the evidence, that the defendant exceeded his authority, in order to render him liable to an action.

Answer. This action is not against the defendant as agent of the plaintiff. If it appears to the jury that he was the agent of the plaintiff, and acted within his authority, the plaintiff cannot sustain his suit.

King and T. Sergeant, for the plaintiff in error.

1st bill of exceptions. The sheriff's deed is not evidence without producing the judgment and execution. The sheriff is a mere agent, and his authority must be shown. This principle has often

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been decided in this court in ejectment. *Wilson v. M'Veagh*, 2 *Yeates*, 16. *Weyand v. Tipton*, 5 *Serg. & Rawle*, 382. *Porter v. Neeland*, 4 *Yeates*, 109. In *Burke's lessee v. Ryan*, 1 *Dall.* 84., the court allowed the deed to be read without such evidence: but there possession had gone with the deed for more than twenty years; whereas in the present case, the sheriff's deed was not eighteen years old. Strictly speaking, a deed, in order to be read without proof, should, like a will, be thirty years old. *Shaller v. Brand*, 6 *Binn.* 435. At the expiration of that period, persons at the age of eighteen are presumed to be all dead, so that the execution cannot be proved, as the calculation of life is that a person of the age of eighteen will live thirty years and one month. *Price on Annuities*, 327. But even if considered as proved, still the objection remains, that it was executed without authority, and that cannot be presumed, as it is matter of record, and within a comparatively recent period.

2d bill of exceptions. The exemplification produced was only part of the record of the Orphans' Court, and the whole ought to have been produced. When records are exemplified, the whole, in general, must be exemplified; for the construction is to be taken from a view of the whole together. *Phill. Ev.* 290. *Gilb. Ev.* 17. 3 *Inst.* 173. This record shows no petition to the court, no consent of parties to the appointment of appraisers, no order of court for their proceedings, otherwise than by their own recital. If the Orphans' Court act without authority, their decree is void, and may be taken advantage of collaterally. *Messinger v. Kintner*, 4 *Binn.* 97. This renders it more particularly requisite, that the whole record should be exemplified, so that it may appear that they have not exceeded their jurisdiction.

3d bill of exceptions to the charge of the court.

1. The court below erred in their answer on the first point proposed by the plaintiff's counsel. The court say, that the plaintiff was not bound to prove a tender of a deed, because the action was not brought for the purchase money, but for non-performance of the contract, and because the defendant had refused to take the purchase or comply with his contract, before the day. These reasons are insufficient. An action for the purchase money is an action for the non-performance of contract: and in both, the plaintiff is bound to show, that he did all that was incumbent on him to do, before he can recover. Here, he was bound to make a title: that was a previous, or at any rate a concurrent act with the payment of the purchase money: and, therefore, he is bound to show that he made a title as far as it was in his power. 2 *Phill. Ev.* 64. *Zerger v. Sailor*, 2 *Binn.* 24. Indeed this was emphatically an action for the purchase money. The declaration does not aver any resale: it demands the whole purchase money. The defendant's refusal before the day cannot be taken advantage of by the plaintiff; because the declaration avers performance, or an offer to perform.

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If the plaintiff relied on a discharge before the day, the declaration should have specially stated such discharge, as was done in *Jones v. Barclay*, Doug. 684. 2 *Phill. Ev.* 82. In *Jordan v. Cooper*, 3 *Serg. & Rawle*, 564, the court held, that if the declaration averred a performance on the first of *May*, proof could not be given of a waiver of that day by the defendant, and acceptance at a subsequent day, but the declaration should have been specially drawn according to the fact.

2. and 3. The court erred in their answers to the second and third points proposed. By the terms of sale, the plaintiff was bound to make a clear and indefeasible title, free from all incumbrances, except the one mentioned. He avers in his declaration, that he was ready and willing to do so, and even if the defendant before the day denied the purchase, that does not exempt the plaintiff from the obligation of showing that he could have complied with his contract. A purchaser has a right to refuse an incumbered title: and if the plaintiff's title was not clear, he has sustained no damage by such refusal. It is immaterial whether the purchaser assigned the incumbrances as a reason for refusing or not: it was indispensable for the plaintiff to make out, that the title was clear, before he could put the defendant in the wrong. In *Judson v. Wass*, 11 *Johns.* 525, in an action for the non-payment of the first instalment on a contract for the sale of land, where the plaintiff had covenanted to make a title, it was held that the execution of a deed by the plaintiff, and the payment by the defendant, were simultaneous acts, and that the plaintiff was bound to show he had a good title, and, therefore, could not recover, it being proved the land was subject to a prior mortgage. In *Tucker v. Woods*, 12 *Johns.* 180, which was an action to recover damages for non-performance of a contract by the defendant to sell land to the plaintiff, part of the bargain was, that the plaintiff should convey certain land to the defendant in part payment; it was proved that the land to be conveyed by the plaintiff was under lease, and therefore he could not make a good title; it was held that the plaintiff could not recover. And in that case, the defendant did not object, when the plaintiff offered to convey, that the land was under lease, but said he had changed his mind, and would not perform the contract, and the plaintiff might seek his remedy. So it is laid down in 2 *Phill. Ev.* 64., that in assumpsit on sale of real property, the defendant may show a defect of title in the vendor, and on that ground rescind the contract; as where the vendor had an interest in the premises for a shorter time than he contracted to sell, or where the premises are subject to an incumbrance, or annual payment, of which no notice had been given. To the same effect are *Jones v. Gardner*, 10 *Johns.* 266. *Cunningham v. Monell*, 10 *Johns.* 203. *Green v. Reynolds*, 2 *Johns.* 207. In Chancery also, the vendor claiming relief must show a complete title free from all incumbrances. *Sugd. Vend.* (6th edition,)

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165, 176, 245, 278. The purchaser may always have a reference as to title, *Ib.* 165. and is entitled to a covenant that the estate is free from incumbrances, *Ib.* 331. 2 *Madd. Ch.* 343, 347. It is a further cause of complaint against the court that they do not answer the question proposed, whether the defendant was bound to take the land, or was liable to an action, but merely state, that the incumbrances were not the cause of his refusal, but that he had refused before the day to take the purchase. Their language also is incorrect, for the defendant could not in point of law refuse before the day: the plaintiff had no right to call on him for performance before the day, and if he did, the defendant had a right to refuse.

4 and 5. The fourth point proposed by the defendant was not answered by the court. They were asked, whether this action could be maintained if the defendant acted as agent for the plaintiff, and exceeded his authority. The answer is, that if he was agent, and acted within his authority, he is not liable: leaving the question still to be solved, whether he is responsible in this action, if he exceeded his authority. It has been frequently determined by this court that it is error if the court below do not answer the question fully. *Shaffer v. Landis*, 1 *Serg. & Rawle*, 449. 2 *Serg. & Rawle*, 44, 84, 415. *Fisher v. Larick*, 3 *Serg. & Rawle*, 319. We contend, that the defendant, if agent, was liable only in an action on the case, for negligently or fraudulently violating his instructions, and not as a contractor. The latter mode of proceeding would deprive him of many grounds of defence, of which he might avail himself in the former. The proper remedy, say the court, in *Sargent v. Morris*, 16 *Johns.* 74, for a violation of instructions, is an action on the case. And it was there held, that trover will not lie against an agent who sells goods deposited with him for sale, at a price less than that limited. In an action against an agent, he is entitled to an allowance for a loss that occurs, where he acts with good faith, and due diligence. *Andrews v. Pardee*, *Hall's Journ. Jurisp* 137 *S. C. Connecticut*.

They further contended that the declaration was defective: 1. Because it did not aver that the plaintiff had tendered a deed, or that he was ready to do so, and the defendant discharged him. *Zerger v. Sailor*, 6 *Binn.* 28. *Green v. Reynolds*, 2 *Johns.* 206. *Cunningham v. Monell*, 10 *Johns.* 203. *Jones v. Gardiner*, 10 *Johns.* 266. 2 *Chitt. Plead.* 127. 2 *Went. Pl.* 91. 105. Being ready and willing, and performing or offering to perform in general, is not sufficient. 2. There is no promise or assumption by the defendant, laid in the second count. It is not sufficient to state circumstances from which a promise may be deduced, as that the defendant became the purchaser: a promise must be laid expressly. 1 *Lev.* 164, *Sid.* 246. *Cro. Eliz.* 913. 2 *Str.* 793. 2 *Call*, 39. 6 *Mod.* 613. In *Winston's Executors v. Francisco*, 2 *Wash.* 187, it is expressly decided, that in an action of assumpsit, a promise by the defendant must be averred, and the want of it is not

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cured by verdict. 3. The second count states a demand of performance on the 26th *December*, which was before the defendant was bound to perform. 4. Neither count states the plaintiff's title, or that he had a title. The proper form is an averment, that the plaintiff was seised in his demesne as of fee, and being so seised agreed to sell. 1 *Brownl. Ent.* 224, 2 *Went. Pl.* 9. In the first count, no right or title in the plaintiff is stated; and in the second count, he is said to have been the "owner," which is a word of indefinite meaning, and may embrace an estate for years, or an equitable estate. It ought to have been said that the plaintiff had a fee simple.

J. R. Ingersoll and *Bradford*, contra.

1st bill of exceptions. In ejectment, it is true, the judgment and execution must be shown, in order to warrant the giving of the sheriff's deed in evidence: for there the title is expressly in issue. But in an action for the non-performance of an agreement of purchase, a different rule must prevail. In such case it has been held, that the vendor in making out his title need not prove the execution of deeds by calling the subscribing witnesses: and this decision has never been overruled. 1 *Phill. Ev.* 407. *Sugd. Vend.* 178. In analogy to this principle, the sheriff's deed may be read without proving his authority. Its effect on the title was open to discussion, after it had been read in evidence.

2d bill of exceptions. All that was material in the proceedings of the Orphans' Court was exemplified; and it was not necessary to embrace more. We produced as much as was requisite to show our title, namely, a valuation and partition among the heirs of *William Broadnax*, under the authority of the proper court. The court will not presume a want of jurisdiction, or an irregularity in their proceedings, when nothing appears to justify such presumption. On the contrary, they will presume a partition and order, on which the appraisers and the court made a final partition.

As to the charge of the court. 1st point. It was not necessary for the plaintiff to tender a conveyance, because the defendant would not take the land. The plaintiff cannot be called upon to do a nugatory act. All that is requisite is, that he should show that he was ready and willing to perform his part of the contract: and if before the day, the defendant denies that he made the purchase, the plaintiff is not bound to go further. 2 *Phill. Ev.* 62.

2d and 3d points. The defendant could not object at the trial, that the land was incumbered, because he refused on other grounds, and not on that account. He denied the purchase. If he had declined compliance with his contract on that ground, the plaintiff could have removed the incumbrances, and would have done so before the 1st *April*. This case cannot be distinguished from the case of *M'Murtrie v. Bergasse*, tried at *Nisi Prius* before the CHIEF JUSTICE, where the defendant objected on the trial, that the

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property was subject to a ground rent not mentioned at the time of sale. But the court overruled the objection, because the defendant had denied that he had made the purchase, and made no objection on account of the ground rent. So in *Pickering v. Stapler*, 5 Serg. & Rawle, 107, it was held, that if the purchaser refuse to accept a deed on account of some alleged defect in it, he cannot afterwards entitle himself to damages by showing that the vendor was not able to deliver possession.

4th and 5th points. Though the language of the court is somewhat indistinct, yet what they meant to say was, that if the defendant acted as agent, and went beyond his authority, he was liable in this suit. If the agent bids more than he is authorised to bid, he may be considered as bidding on his own account, and proceeded against as a purchaser. *Sugd. Vend.* 36. 7 *Cranch*. 367. 2 *Johns.* 48. 15 *Johns.* 45.

The alleged errors in the declaration are not well founded, or are cured by the verdict.

1. The modern authorities show that it is sufficient to allege performance or a readiness to perform. 2 *Phill. Ev.* 63. 10 *Johns.* 203, 266. 2 *Johns.* 207. 2. It is also unnecessary to aver that the defendant assumed. If sufficient is stated to show the defendant's liability, it is good after verdict. 3 *Mass. Rep.* 167. 9 *Mass. Rep.* 199, 1 *Salk.* 198. 3. The declaration does not aver a demand of performance before the day: but if there be an ambiguity, the verdict cures it. 4. The modern precedents do not set out the title: it is enough to say, that the plaintiff was seised in fee, and the word "owner" is equivalent to that. 2 *Chitty's Plead.* 129.

The opinion of the court was delivered by

TILGHMAN, C. J. This action was brought by *William Speckenagle* the plaintiff above (who is defendant in error,) against *Alexander Hampton*, for breach of contract, respecting a tract of land sold by the plaintiff to the defendant. The sale was by public auction, and the price 89 dollars 50 cents per acre. The defendant denied that he was the purchaser, and averred, that his bid of 89 dollars 50 cents an acre, was made, as agent for the plaintiff, and on his account. Several bills of exceptions were taken by the defendant in the course of the trial below, to the opinion of the court on the admission of evidence; an exception was also taken to the opinion of the court on several points proposed by the defendant's counsel, and given in charge to the jury. Errors have been assigned also in the plaintiff's declaration

1st. It appears by the first bill of exceptions, that the plaintiff in making out his title to the land sold to the defendant, offered in evidence, a deed from the Sheriff of *Bucks County*, without producing the record of the judgment and execution recited in the deed, by virtue of which, the sale was made by the Sheriff. This deed

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was objected to by the defendant's counsel, but the court admitted it.

A Sheriff's deed conveys no title, unless the Sheriff was authorized to sell, and his authority can be proved in no other manner than by showing a judgment, and the subsequent process of execution and *venditioni exponas*. A deed by which nothing passes, is not evidence. A Sheriff's deed was permitted to be given in evidence, without showing the judgment and execution, in the case of *Burk's Lee. v. Ryan*, 1 *Dall.* 94, where possession had gone along with the deed for more than twenty years. But where it was unsupported by great length of possession, this court rejected it, in the case of *Wilson's Lee. v. M'Veagh*, 2 *Yeates*, 86, and *Weyand v. Tipton*, 5 *S. & R.* 332. In the present instance, therefore, it ought not to have been admitted.

2d. The plaintiff offered also in evidence, part of the record and proceedings in the Orphans' Court of *Bucks County*, respecting the valuation and partition of the real estate of *William Broadnax*, deceased, to which the defendant's counsel objected, but the court admitted the evidence, and an exception was taken to their opinion. This is the second bill of exceptions. When the exemplification of a record is offered in evidence it must contain the *whole record*, because the court cannot form a correct judgment, without seeing the whole. The law is so laid down in *Gilbert's Treatise on Evidence*, p. 17, and in 1 *Phill. Ev.* 290. And the reason of this rule will plainly appear, when applied to the case before us. The part of the record which was produced, shewed that certain persons, by order of the Orphans' Court, made a valuation and partition of the real estate of *William Broadnax*, and reported their proceedings to the court, by whom they were confirmed. But the petition, and the facts, on which the order of the court for making partition was founded, did not appear, so that it was impossible for the District Court to judge, whether it was a case within the jurisdiction of the Orphans' Court, and if not, the proceedings were void. The evidence, therefore, ought not to have been received.

3d. The third exception was to the charge of the court, on several points proposed by the counsel for the defendant.

The first point was, "that the plaintiff was not entitled to recover, because he had never executed, or tendered, or offered to tender, a deed to the defendant for the property alleged by him to have been sold to the defendant, for the breach of the contract concerning which, the suit was brought." The court answered, "that this suit was not brought for recovery of the purchase money, but damages for refusing to comply with the contract, and inasmuch as the defendant had told the plaintiff before the time fixed for the plaintiff's making the conveyance, that he would not take the land, because he had never purchased it; the plaintiff might recover damages without tendering a deed of conveyance." It is of

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no importance, whether the court was correct in the distinction between an action for recovery of the *purchase money*, and one for recovery of *damages*, for refusing to comply with the contract. The material question was, whether a tender of the deed was essential to the plaintiff's recovering in this suit. And I am of opinion, that under the circumstances stated by the court, it was not; for why should the plaintiff tender a deed, which the defendant told him he would not accept? It would have been a nugatory act, which, from the conduct of the defendant, it might fairly be presumed, he had dispensed with. He denied that he had made the purchase, and made no other objection. That was the only point in dispute. There was no error, therefore, in the opinion of the court on this head.

The second and third points may be reduced to one, viz: "that the defendant was not bound to take the land, even if he had been the purchaser, because there were incumbrances on it, not mentioned at the time of sale." The court answered, that "these incumbrances were not the cause assigned by the defendant, for his refusal to perform the contract on his part, nor made the ground of objection, but that he had refused to take the purchase before the time limited for making the deed and discharging the incumbrances." This answer was not quite so full as it ought to have been. Although the defendant had declared, that he would not take the land, yet before the plaintiff would be entitled to recover damages, it was incumbent on him to show that it was in his power to make a good title. He has averred in his declaration, that he was ready to do all things necessary to be done on his part, and that averment cannot be supported, if he was unable to make title. If the incumbrances were of such a nature, that the jury might be satisfied from the plaintiff's evidence, that he could and would have removed them, had the defendant been willing to accept a conveyance, the case would fall within the principle of *McMurtrie v. Bergasse*, and the plaintiff might recover. But the ability to discharge the incumbrances, was a point which lay upon the plaintiff to establish *beyond doubt*. If he failed there, he could not be entitled to damages. But if he satisfied the jury on that point, he might recover.

The defendant's fourth point was, that if the defendant acted as agent for the plaintiff, and *exceeded his authority*, the plaintiff had mistaken his remedy, and could not recover in this action. And the fifth point was, that the action could not be supported, unless the jury were satisfied that the defendant had exceeded his authority. To both these points, the court answered, "that this action is not against the defendant as agent of the plaintiff; and that if it appeared to the jury that he was the agent of the plaintiff, and acted *within his authority*, the plaintiff cannot sustain his suit." The defendant's counsel complain, that their fourth point was not answered, and indeed, it does not seem to have been answered so distinctly as it might have been, although I think the opinion intended to have

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been given, was correct. The meaning of the court I take to have been, that if the defendant was an agent, and acted *within his authority*, the action could not be supported; but although employed by the plaintiff as an agent to bid for him at the auction, yet *if he exceeded his authority*, he would be considered in law, as having divested himself of the character of agent, and made the purchase on his own account. If I am right in supposing that to be what the court intended, no fault can be found with the opinion, (See *Sugden*, 36, 5 *Lond. Ed.*).

There were several errors assigned in the declaration, which need not be minutely investigated, because, as the judgment must be reversed, for other causes, the plaintiff's counsel will have an opportunity of amending any thing which may be defective, before the cause comes to trial again in the court below. In order to avoid cavil, I think it would be prudent to lay a positive assumption by the defendant, and to aver, that the plaintiff was seised of a good estate in fee simple. Any other errors, if errors there were, would be cured by the verdict. Upon the whole, I am of opinion, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

— ◆ — 64 Ps. 2. 67
[PHILADELPHIA, FEB. 10, 1823.]

In the case of JOSEPH WALKER'S Estate.

APPEAL

Commission of executors fixed at three per cent. upon settling an account to the amount of 37000 dollars, which principally consisted of bank shares transferred to the legatees, though the executors were also to pay some annuities, clothe and educate children, and distribute some dividends of bank shares in charities; there being no evidence of the degree of trouble the executors had had in these respects.

The number of the executors is not to make any difference in the rate of commission. If their trouble is unequal, a share of the commission ought to be assigned to each, proportioned to his trouble.

Commission should be paid for services when rendered, not by anticipation for such as may be done in future.

THIS was an appeal by *Samuel Walker, William Blakey and Thomas Hutchinson*, executors of *Joseph Walker*, deceased, from the decree of the Orphans' Court of *Philadelphia*, County, on the settlement of their accounts. The only dispute was respecting the amount of the commissions they were entitled to. The will of *Joseph Walker* was proved on the 3d *May*, 1813. On the 24th *December*, 1813, the first account of the executors was filed, in which they charged a commission of five per cent. on 41,117 dollars and 15 cents: and on the 18th *February*, 1814, this account was confirmed in the Orphans' Court. In *August*, 1818, they filed a second account, which was referred to auditors: the commission

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charged, was 102 dollars 37 cents, on 14,108 dollars 36 cents, which was allowed by the auditors, and no exception was taken. In *April*, 1818, an application was made to the Orphans' Court, to refer the first account to auditors, which was done. The auditors confirmed the allowance of five per cent. commission, the account, after correcting errors, being reduced to little more than 37000 dollars. Exceptions were filed to their report, that the commission was too high. The court, after hearing the exceptions, reduced the commission to three per cent.

Binney for the appellant, contended, that the commission ought to be restored to the sum fixed by the auditors, namely, five per cent. No particular sum is established by any law, and courts, in the adjustment of the *commission*, must be governed by circumstances. If the trusts imposed on the executors by this will are adverted to, five per cent will be thought a moderate compensation. In the first place, all the children of the testator's sister *Mrs. Paxton*, who are under age, are to be clothed, and completely schooled and educated, at the expense of his estate, by his executors. Secondly, the interest on the bond and mortgage of *Mahlon Paxton*, is to be recovered by the executors, and paid to *Mrs. Paxton*, during her life. Thirdly, an annuity of 200 dollars is to be paid to her during life. Fourth, an annuity of 100 dollars is to be paid to *Mrs. Hutchinson* for life. Fifth, ten shares in the bank of *Philadelphia*, are to be received by the executors, and expended in charity, viz: the clothing of poor children. No additional charge will be made on paying the annuities hereafter. It is, also, to be considered, that the trouble is increased by the residence of two of the executors in *Bucks County*, and one in *Philadelphia*.

J. R. Ingersoll, contra. The compensation to executors cannot be settled by any definite rule. On large sums, where the trouble is not much, the commission should be small: and *e contra*, it must be increased in proportion as their trouble is increased, and the sum passing through their hands diminished. If there are several executors, and their trouble is unequal, the compensation to each should be different. In this case, *Hutchinson* is allowed 100 dollars extra, for travelling expenses. As to the annuities to be paid, it is uncertain how long these executors may live, to pay them, and then others will come, who may charge a commission on their payments. These executors have charged commissions on money remaining in their own hands, (about 5000 dollars,) as a fund to perform the trusts: and it is doubtful, whether the commission for paying these annuities, ought not to come out of the fund which is to pay them. The inventory contains almost the whole estate, which consisted of bank stock of different kinds, transferred by the executors to the legatees without further trouble. *Mrs. Paxton's* children are all now of age: and *S. Walker*, the acting executor, who lived in *Philadelphia*, has removed to a distant part of *New-York*, so that he cannot do much more, and some other person

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must be employed, who will be entitled to receive compensation. When the Orphans' Court heard these exceptions, evidence was laid before them respecting the trouble which the executors had had, in administering the estate, and upon this they decided. This court has no evidence laid before them, upon which they can undertake to say, the Orphans' Court were wrong, and, therefore, will not lightly change the sum they have allowed.

Binney, in reply. Five per cent. has been the usual commission, and was allowed by the auditors, who heard these parties fully, and thought it reasonable. Part of the receipts are rents from old houses which must have required great attention: the sums received were small, and the various disbursements consist of numerous small sums. Five per cent. is a small compensation for the receipt of such rents. After correcting errors, the total commission will be but five per cent. on 37000 dollars. There would be a peculiar hardship in reducing it now, because the first account was never questioned until after the settlement of the second account in *August*, 1818, and this account was settled on a supposition, that the first account was closed, and therefore, less commission was charged, than would have been, had it been known that the first account was to be opened, and the commission called in question. The executors have charged travelling expenses, but nothing for the time spent in travelling. It is extremely difficult for executors to prove the exact degree of trouble they have had.

Until some law is made, fixing compensation, the best rule is to consider five per cent. as the ordinary allowance, and not to depart from that, either by exceeding or falling below it, unless under special circumstances.

The opinion of the court was delivered by

TILGHMAN, C. J. The executors of *Joseph Walker* have appealed from the decree of the Orphans' Court, on the settlement of their account. The only dispute is on the subject of their commission. The executors charged five per cent. which the court reduced to three.

There were three executors, one of whom, (*Samuel Walker*, brother of the testator,) resided in the city of *Philadelphia*, and the two others in *Bucks County*. A commission of five per cent. was allowed on a sum of 37000 dollars, and something more. The amount of the commission was 1,862 dollars 10 cents, which being divided between the three executors, gave 620 dollars 70 cents to each. Having explained the principles by which the compensation of executors should be regulated, in the opinion which I have just delivered in the case of *Pusey v. Clemson*, it is unnecessary to repeat them now. The Orphans' Court were of opinion, that this was a case in which the usual commission of five per cent. should be departed from, and it lies upon the appellants to show that the decree was erroneous. It appears, that the estate consisted principally of bank

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stock, which was transferred by the executors to the legatees of the testator, so that the executors were saved the trouble of collecting the money, and paying it over. For this kind of service, three per cent. is a very ample allowance. But several circumstances have been mentioned, to show that the executors had considerable trouble in the discharge of their duty. They were to attend to the clothing, and education of the children of the testator's sister, *Mrs. Paxton*, while in their minority. They were to pay an annuity of 200 dollars to *Mrs. Paxton* for her life; an annuity of 100 dollars to *Mrs. Hutchinson* for her life, and distribute the dividends on 10 shares in the bank of *Philadelphia*, in charities. Some reliance too was placed on the circumstance of there being three executors, so that the compensation was not so great, as if the whole had been given to one. I do not think, the number of the executors should make any difference in the rate of commission. The question is, what is an adequate allowance for the trouble of doing the whole business. If the trouble of the executors has been unequal, as is generally the case, they should do justice among themselves, by assigning to each, a share of the whole allowance, proportioned to his trouble; or, if they choose to divide it equally, it is their own concern, and they may settle it as they please. With regard to the clothing and education of *Mrs. Paxton's* children, it may have been very great, or very little. If the executors had to attend to all the details of clothing, schooling, &c. the trouble has been great. But if the mother took all this upon herself, and the executors had only to advance, from time to time, such money as was necessary, their trouble has been little. On this subject we have been left in the dark. The executors have produced no evidence. As to the annuities and the charity, the counsel for the executors says, that it is not intended to make any charge for the trouble of future payments, and therefore, it is reasonable, that they should be allowed a commission of five per cent. on the whole capital remaining in their hands, as a fund to answer the annuities, and the annual charity, (upwards of 5000 dollars). But to this it has been truly answered, that it is impossible to say, how long the executors may live, and in case of their death, the trouble will fall on other persons, who will expect a compensation. The safest way is, to make a reasonable allowance to the executors, for the services which they have performed, without anticipating what may be done in future. Considering all the evidence which has been laid before us, I cannot say, that the appellants have shown sufficient cause for reversing the decree of the Orphans' Court, and therefore, I am of opinion that it should be affirmed.

Judgment affirmed.

AUG 18 1823

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1823.

[PHILADELPHIA, MARCH 21, 1823.]

The Germantown and Perkiomen Turnpike Company *against*
Naglee.

-IN ERROR.

A corporation must give absolute security for debt, interest, and costs, on appealing from the judgment of an alderman against them. If the security be for less, the appeal may be dismissed.

John Naglee, the defendant in error, brought this suit originally before *Alderman Geyer*, and recovered judgment against the defendants, for the sum of 65 dollars and 70 cents. The defendants appealed to the court of Common Pleas, and entered security in the sum of 30 dollars. The court below held, that the defendant had not given sufficient security, and, on motion, dismissed the appeal.

Chew, for the plaintiffs in error, contended, that no security was necessary in this case, and, therefore, the appeal was regularly entered. Under the act of 20th *March*, 1810, sect. 4. *Purd. Dig.* 355, a body corporate or politic is entitled to an appeal from a justice without being bound with surety in the nature of special bail. The act of 22d *March*, 1817, sect. 4. provides, that "when any corporation shall be sued, and shall appeal, or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest, and costs on affirmance of the judgment." This act only provides for the change of the nature of the security where bail was then requisite: but in the present case, no bail was requisite, and therefore, the act does not apply.

Mahany, for the defendant in error, urged that the construction

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given by the court below was the proper one; namely, that it was the intention of the legislature to direct, that in all cases where private persons were previously bound to give special bail on appeal, corporations should give absolute security for the debt, interest, and costs. The reason why corporations were exempted from giving special bail was, that it was inconsistent with their character and nature: they could not be surrendered in discharge of bail, 2 Binn. 264. But this objection did not apply to their giving absolute security: and, therefore, the legislature could not mean to exempt them in any case. As the security was not regular, the proper course was to dismiss the appeal. 1 Serg. & Rawle, 491. 3 Serg. & Rawle, 93.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action brought by *John Naglee*, against the *Germantown and Perkiomen Turnpike Company*, before Alderman *Geyer*, who gave judgment for the plaintiff for 65 dollars and 70 cents. The defendants appealed to the Court of Common Pleas, and entered security in the sum of 30 dollars only. The court ordered the appeal to be dismissed, because the security was not sufficient to answer the debt and costs, and the question is, whether this was a case in which the defendants were bound to give *any security*. By the act of 20th March, 1810, sect. 4. *Purd. Dig.* 355, in case the defendant appealed from the judgment of a justice or alderman, he was to be bound with surety in a sum sufficient to cover the sum in controversy, with costs, &c.; but this obligation was to be in the nature of *special bail*, and therefore bodies corporate were expressly excepted, and might appeal without giving any security. Thus the thing remained, until the passing of the act of 22d March, 1817, entitled, "An Act relative to suits brought by or against corporations;" by the 4th section of which it was enacted, "that in case of appeal, *certiorari*, or writ of error, by any corporation, the oath or affirmation required by law, shall be made by the president or other chief officer of the corporation, or in his absence, by the cashier, treasurer, or secretary, *and when any corporation shall be sued, and shall appeal or take a writ of error, the bail requisite in that case, shall be taken absolute for the payment of debts, interest, and costs, on affirmation of the judgment.*" The argument of the defendants' counsel is, that inasmuch as no bail was requisite in this case at the time of the passage of the act last mentioned, the provision of the 4th section did not extend to it. The argument is not without ingenuity, but it gives a construction not consistent with the intent of the act. It was understood, that under the former law, when individuals gave security upon an appeal, in the nature of *special bail*, corporations were *exempt from all security*; and this was thought to be an inconvenience to plaintiffs. How was this to be remedied? To say that corporations should give security in the nature of *special*

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bail, would be absurd, and therefore it was, that the act of 1817, required the security to be *absolute*. The words of the 4th section are very comprehensive, and I have no doubt, were intended to provide for this very case. I agree therefore to the construction given to this act by the Court of Common Pleas, and am of opinion that the judgment should be affirmed.

Judgment affirmed.

[PHILADELPHIA, MARCH 23, 1823.]

Bank of Montgomery County *against* WALKER.

IN ERROR.

The indorser of a promissory note is not a competent witness, in a suit against the maker, to prove, that though drawn as a note of business, and so discounted by the holder, it was in reality in its origin a note for the accommodation of the indorser, especially if the indorser gave a bond of indemnity to the maker when the note was drawn.

If a note be drawn and indorsed for the accommodation of the indorser, and a bond of indemnity be given by the indorser to the maker, the holder does not discharge the maker by giving time to the indorser after the day of payment, though the holder knows, when time is given, that it was a note for the accommodation of the indorser.

THIS was a writ of error to the Court of Common Pleas of *Chester* county, where a verdict and judgment were rendered for the defendant. The case was tried before HALLOWELL, President, who held a Special Court for the trial of causes, in which DARLINGTON, President, had been of counsel.

It was an action on a promissory note, dated the 1st *November*, 1817, drawn by the defendant *Thomas Walker*, in favour of *Walker*, and *George*, or order, and by them indorsed to the plaintiffs, for 3000 dollars, at 90 days after date. On the trial, the defendant offered in evidence, the deposition of *Enoch Walker*, one of the firm of *Walker & George*, which was objected to by the plaintiff. And the court being of opinion that the deposition was legal evidence for the purpose of showing, that the original note of the 18th *June*, 1816, and the subsequent notes, including the note in question, were accommodation notes; that the said *Enoch Walker* was a director of the Bank of *Montgomery* county; and that the Bank knew of their being accommodation notes, and when they came to that knowledge, overruled the objection, and admitted the deposition; to this opinion, the plaintiffs excepted.

The defendant, afterwards, offered *Thomas George*, one of the firm of *Walker & George*, but the plaintiffs objected to him. The court, being of opinion that *Thomas George*, was a legal witness,

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admitted him to be affirmed and examined. To this opinion, also, the plaintiffs excepted.

Enoch Walker and *Thomas George* stated, that they carried on the milling business, under the firm of *Walker & George*, and on the 15th June, 1816, obtained of the defendant, who was a farmer, and the brother of the said *E. Walker*, his promissory note in their favour, for 3000 dollars, which they indorsed, and had discounted in the Bank of *Montgomery* county: that the note was drawn in the form of a business note, but was solely for the accommodation of the said *Walker & George*, no value ever having been received for it by *T. Walker*, the defendant. That at the time of making the note, *E. Walker* and *T. George* gave to *E. Walker*, the defendant, their bond, conditioned for the payment of 3000 dollars, in one year, which, they stated, was given to show, that *T. Walker* had received no part of the money upon the note. The witnesses could not recollect, that any thing was said to the board of directors, of the note's being an accommodation note, at the time it was discounted, or that any notice was given to them, that the said bond had been taken. The note was renewed several times, till at length *T. Walker* informed *E. Walker* that he could not renew the note. The cashier informed *E. Walker*, who had other notes discounted there, that his notes were lying over, and that it was necessary to have new notes, to which he answered, that *T. Walker* declined renewing: that it was not necessary to have a new note from *T. Walker*, as he was drawer and was sufficient. The note on which this suit was brought, which was the last of the renewed notes, remained in the bank, *Walker & George* paying the discount from time to time, as it became due, until near the 27th January, 1819, when *Walker & George* failed, and made an assignment. A few weeks previous to the assignment, the Bank requested *E. Walker* to obtain a new note from *T. Walker*, so as to have the said note renewed according to the order of banking institutions. *E. Walker* accordingly applied to *T. Walker*, but he positively refused, and would not sign a new note. The day before the assignment a deputation from the Bank waited on *E. Walker*, and inquired of him, why he did not have the note renewed; he assigned as the reason *T. Walker's* refusal. At this time *T. Walker* had notice, that the note was unpaid: but there was no proof that he knew it before. *E. Walker*, when the first note was given, was a director of the bank, and continued such till the time of his assignment. No part of the bond had ever been paid to *T. Walker*, nor any demand made upon him.

The plaintiff requested the court to charge the jury on several points.

1st. That where a note is drawn, in the form of the note upon which this suit is brought, the maker is not discharged, by the holder's giving time, or accepting interest, or part payment, from the indorser, where the holder, or plaintiff, paid value for the note.

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2d. That in a suit brought on such a note, by the holder against the maker, the maker is not discharged, by the holder's receiving a part, or interest upon the whole, from the indorser, and giving him time, even if, as between the maker and indorser, it was an accommodation note, unless express notice was given the holder of the note, before he paid value for it, that it was an accommodation note.

3d. That in a suit brought as above stated in No. 2. the maker is not discharged, if the holder has received a part payment, or a payment of interest from the indorser, and has given him time, even if in fact as between the maker and indorser the said note was an accomodation note, and notice thereof was at any time given to the holder by the maker, provided the holder paid value for said note.

The PRESIDENT of the court charged the jury, that the material point for the jury to consider was, whether, when the note on which this action was founded became due, or about that time, and when the plaintiffs and *Enoch Walker* made the arrangement, of which he testified, the plaintiffs knew it to be an accommodation note. If from the evidence, the jury were of opinion, that they did, the plaintiffs then stood in the situation of creditors, having *Walker* and *George* for their principal debtors, and *Thomas Walker*, the defendant, as their surety, and the case must be determined not on the principles relating to negotiable notes, but on those regulating the relation of creditors, principals and sureties. A creditor thus situated, while he remains passive, retains all his rights, and the surety, whether he be the obligor in a bond, the maker of an accommodation note, or the indorser of a note of business fixed with demand and notice, is liable to the creditor, for any length of time, short of that fixed by legal presumption, or by the act of limitations. But he must be careful how he acts; for if without the knowledge or participation of the surety, he makes any new agreement with the principal debtor, for instance, if he receives part, and gives further time for the rest, the surety is discharged. The court were, therefore, of opinion, that if the plaintiffs knew, at or about the time the note in question fell due, and when they made the arrangement, of which *Enoch Walker* testified, that it was an accommodation note, their conduct in making and continuing that arrangement, as detailed in the deposition of *Enoch Walker*, without the knowledge or consent of the defendant, for a period of near twelve months, and until the failure of *Walker & George*, operated in point of law, as a discharge of the defendant, and if the jury were satisfied, from the evidence, that the plaintiffs did then possess such knowledge, let them have derived it from what source they might, their verdict must be for the defendant. The plaintiffs, thereupon, excepted to the charge of the court.

Tilghman, for the plaintiff in error. This record involves two questions. First, whether the indorser of the note in question can

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be a witness to prove the circumstances set up by the defendant as a discharge. Second, whether these circumstances, if duly proved, amount to a discharge of the defendant.

1. The party to a negotiable instrument is not a competent witness to prove circumstances that occurred before the making of the note, in order to destroy its legal obligation. In *Pennsylvania*, the law has been uniform in following the decision in *Walton v. Shelly*, 1 *T. R.* as modified by *Bent v. Baker*, 3 *T. R.* 35, that a party to a negotiable instrument shall not be a witness to impeach it. In *Stille v. Lynch*, 2 *Dall.* 194. in an action by the indorsee against the drawer of a promissory note, the indorser was not allowed to prove that the note was originally given without consideration. In *Pleasants v. Pemberton*, 2 *Dall.* 196, the rule was recognized by the Supreme Court, that the party to a negotiable paper shall not be permitted to invalidate it: and this rule was recognized also in *Baring v. Shippen*, 2 *Binn.* 165, where the Chief Justice says, the law has since that case been considered as settled. CHASE, J. in *Wilson v. Lenox*, 1 *Cranch.* 201, says, that upon the statute of usury, gaming, and the like, but in no other case, are the drawers, indorsers, &c. competent witnesses: and the cases all show it. The rule adopted by the courts of *New York* and *Massachusetts*, is the same with that of *Pennsylvania*, that a party to a negotiable instrument is incompetent to prove it to have been originally void. 1 *Phill. Ev.* 35, 2d ed. note. But a further objection to the indorsers being witnesses is, that they are interested; because, although for the amount of the note, they are liable to either plaintiff or defendant, yet if the Bank had recovered in this suit, the indorsers would have been liable to the defendant, for the costs of this suit. This point was expressly decided in the case of *Jones v. Brooke*, 4 *Taunt.* 461. *Phill. Ev.* 49, 50, where in an action by the indorsee against the acceptor of a bill of exchange which had been accepted for the accommodation of the drawer, the drawer was held not to be a competent witness for the defendants to prove that the holder took the bill for a usurious consideration, because the drawer would be liable to the acceptor in case of recovery in this suit, not only for the principal sum, but also for all damages sustained by the suit. To the same effect is the case of *Goodacre v. Beame*, *Peake's N. P. C.* 174. cited 1 *Phill. Ev.* 49, 50. *Chitty on Bills*, 530.

2. The court below erred in charging the jury, that if the Bank, at or about the time the note fell due, and when the arrangements between them and *E. Walker* were made, knew that the note was an accommodation note, their conduct operated as a discharge of the indorser. We contend, that when the Bank discounted the note, the nature of the note, and the liability of the parties were fixed, and the subsequent events could not affect the responsibility of the indorser. *Dingwall v. Dunster*, 1 *Doug.* 247, the holder of a bill of exchange received interest from the drawer for some

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time after the bill was payable by the acceptor, and suffered several years to elapse without calling on the acceptor, yet it was held that nothing but an express agreement could discharge the acceptor. *El-lis v. Galindo*, 1 Doug. 250, note. *Laxton v. Peat*, 2 Campb. 184, is a *Nisi Prius* case, where Lord ELLENBOROUGH decided merely, that if the holder of an accommodation bill receive part payment from the drawer, and give him time, having had notice when he received it, of the circumstances of its original formation, the acceptor is discharged. This case however was doubted by GIBBS, J. in *Kerrison v. Cooke*, 3 Campb. 362, and an exception to it is there founded on the circumstance of the acceptor promising to pay when the bill became due, and *Laxton v. Peat* was expressly overruled by the Court of Common Pleas, in *Fentum v. Pocock*, 5 Taunt. 192. (1 Serg. & Lowb. 72.) by whom it was held, that the holder taking a *cognovit* from the drawer, payable by instalments, did not discharge the acceptor of a bill; and that, whether the holder, at the time of taking the bill, knew it was an accommodation bill or not. *Carstairs v. Rolleston*, 5 Taunt. 551. (1 Serg. & Lowb. 184,) confirms this decision. In *the Governor and Company of the Bank of Ireland v. Beresford*, 6 Dow's Part. Cas. 234, a bill of exchange was accepted for the accommodation of the drawer, which circumstance was known to the holder when he received it, and time was given to the drawer, yet the acceptor was held not to be discharged, and the case of *Fentum v. Pe-cock* was there cited by ELDON, Chancellor. Nothing discharges the acceptor but payment or release. He also cited *Mallet v. Thompson*, 5 Esp. N. P. C. 179. *Brown v. Mott*, 7 Johns. 361. *Chitt. on Bills*. 381, 382.

Condy, contra.

1. The court below only decided that the deposition was evidence for certain purposes, and to that opinion the plaintiff excepted. If there were other matters in the deposition which according to the court's opinion would not be evidence, it was the business of the counsel to move to have them struck out. The question then is, whether the witnesses were incompetent to prove the facts for which they were offered. And the furthest the courts of this country have gone is, to hold that a party to a negotiable instrument is incompetent to prove it to have been originally void; but he may testify to subsequent facts which do not prove this, as for instance, payment. See the cases collected 1 *Phill. Evid.* 34. In the present case the indorsers were called to prove circumstances happening after the giving of the note, not the invalidity of it *ab origine*; they were therefore completely within the established rule. The argument that the indorsers were interested because they would in a suit by the defendant be liable to costs in addition to the amount of principal and interest recovered, is unfounded, because they might allege that the defendant was not bound to stand suit: he took defence on a ground peculiar to himself, in which they were

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not concerned. At any rate the interest is contingent, because it is uncertain whether the indorser would or would not be compelled to pay the costs, and a contingent interest never incapacitates a witness. 1 *Pet.* 305, *Willings v. Consequa*.

2. The indorsers stood in the light of sureties, and the surety is always discharged if time be given to the principal, or the nature of the obligation be changed. 2 *Ves. Jr.* 540, 544. 7 *Johns.* 332. *Cope v. Smith*, 8 *Serg. & Rawle.* 110. There is no ground for distinction between a surety in a bond and a surety on a note or bill of exchange. The character of an indorser, and the conduct of the holder of a note, will be looked into to do justice in particular cases. In *Ellis v. Galindo*, 1 *Doug.* 250, the holder received part from the drawer of a bill, and took his written promise for the balance, payable in three months; after three years the acceptor was sued, and it was held that he was discharged. *Laxton v. Peat* is an authority in our favour: and it was followed up by Lord ELLENBOROUGH, in *Collet v. Hay*, 3 *Campb.* 362. In *Carstairs v. Rolleston*, 5 *Taunt.* 551. (1 *Serg. & Lowb.* 184,) GIBBS, J. says they give no opinion what would be the case on a note, where the holders originally had notice that it was given without consideration. The case in 6 *Dow*, is a Chancery case, which is not always to be relied on for the law merchant, and that in 5 *Esp. N. P. C.* 178, is not to the purpose, because it turns on the construction of a writing. In *England* there is a distinction between promissory notes and bills of exchange, and much more so in *Pennsylvania*, where unless in cases provided for by act of assembly, the consideration of a promissory note could be inquired into. The *English* cases show, that the courts wished to discourage the practice of accommodation bills, not notes. In *Pennsylvania*, it was an object to facilitate loans by banks on promissory notes. This appears from the injunctions in the act regulating banks, sect. 9, (*Purd. Dig.* 59,) requiring the banks to make loans on bond, mortgage, note, &c. The question then is, whether the court will tolerate such conduct in banks as amount to fraud. In this case, though the bank was informed, that the defendant, the drawer, would not renew it, they yet gave time to the indorsers, by repeated acts, not by actually renewing the note, but by receiving the discount as if there had been a renewal: and this was done for the period of a year, and until the indorsers became bankrupt. When the bank agreed that the money should remain sixty days more in the hands of the indorser, no action could be supported during these sixty days against the drawer, nor could the drawer have paid the money to the bank, and brought his action against the indorsers during that time.

The opinion of the court was delivered by

DUNCAN, J. This was an action against the defendant, drawer

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of a promissory note, made payable to *Walker & George*, at the Bank of *Montgomery* county, and by them indorsed to that Bank.

The defence set up was, that the defendant had only lent his name to accommodate *Walker & George*, without any other consideration than their bond given to him on the same day, and for the same sum; that *Enoch Walker*, one of the indorsers, was a director of the bank; that the note was drawn as a note of business, and was presented to the board of directors, in the manner in which it was written, and discounted by the board accordingly. Nothing was said of its being an accommodation note at the time it was discounted. The note was indorsed by *Walker & George* to the Bank, who paid the full value. The note was renewed several times; at length the defendant informed *Walker & George*, that he would renew it no longer, of which they informed the bank. The last note remained in the Bank for upwards of a year unrenewed, and until a few weeks before the indorsers made a general assignment to their creditors. They continued to pay the regular discounts, as if the note had been renewed. The cashier of the Bank informed them, that it would be proper to have the note renewed by *Thomas Walker*, to which they replied, that it was unnecessary, as *Thomas Walker* was the drawer. *Thomas Walker* had not any notice of the non-payment, until he was called on to renew it, before their assignment. The bond still remained in *Thomas's* hands unpaid, nor has he demanded payment.

The defendant contended, that by the Bank's not giving notice to *Thomas Walker* of the non-payment, and receiving the interest or discount as if the note had been renewed, by this delay and giving of time to the indorsers, the defendant was discharged, as he stood only in the situation of a surety, and was not the primary debtor.

To make out this defence, *Enoch Walker* and *Thomas George*, the indorsers, were offered as witnesses. An objection was made to their competency, as being parties to this negotiable instrument, and, therefore, excluded, by the policy of the law, from giving evidence to impeach it, and because they were interested. The court admitted them, and a bill of exceptions was taken. The court charged the jury in favour of the defendant, in substance stating, "that the material point for the consideration of the jury was, whether *when the note became due, or about that time, and when the arrangement was made, accepting from the indorsers the discount, without the knowledge of the defendant, the Bank knew it to be an accommodation note, no matter from which source they received the information; and if the jury so found, this in point of law was a discharge of the defendant.* For the Bank stood in the situation of creditors, having *Walker & George* as the principal debtors, and *Thomas Walker*, the defendant, as their surety, and it was not then to be determined on the principles regulating negotiable notes, but on those regulating the relation of

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debtors, as principal and sureties." And to this charge the plaintiffs excepted. Our attention is first called to the inquiry, whether, admitting the allegation of the defendant, if proved, to be a defence in the action, the indorsers were competent witnesses to prove it, either on the ground of general policy, or legal incompetency from interest in the event of the action. The principle in the case of *Walton v. Shelly*, that a party to a negotiable instrument shall not be allowed to give evidence to invalidate it, has been recognised too frequently and too solemnly, now to be departed from, and though the objection has been confined within very narrow limits by subsequent decisions in *England*, yet it has not been shaken in this court, but has been restrained to negotiable instruments, properly so called, and negotiated in the ordinary course of business before due. *Pleasants v. Pleasants*, 2 *Dall.* 196. *Baring v. Shippen*, 2 *Binn.* 154. *McFerran v. Powers*, 1 *Serg. & Rawle*, 102. and 4 *Serg. & Rawle*, 397. *Baird v. Cochran*. This objection would not now prevail in *England*: for in *Jones v. Brooke*, 4 *Taunt.* 464, it was decided, that in an action against the acceptor of a bill for the accommodation of the drawer, the drawer would not be rejected on that ground; that it is now the practice, to receive persons whose names are on the bills of exchange to impeach them, though the witness was rejected on the second ground taken here, his incompetency on account of interest.

The witnesses here were offered to prove, what in contemplation of law was fraud on the plaintiffs committed by them in giving currency to this note, by their names, as a note of business. In the case of *Fentum v. Pocock*, 5 *Taunt.* 192, 1 *Serg. & Lowb.* 72, it was declared, that whoever draws an accommodation bill, and procures another to accept it, and negotiates it without letting the person know to whom he passes it, is guilty of a gross fraud. The law of this state is, that though a party to such paper may be received to prove subsequent facts, to discharge the note, yet he shall not be received as a witness to show that it was in truth and in fact not what the instrument it purported on its face to be; in other words, he shall not be permitted to impeach it, or to prove it to be other than the paper itself states; and such was the decision of the court in *Baird v. Cochran*, 4 *Serg. & Rawle*, 397.

For this reason, it is the opinion of the court, these indorsers were not competent witnesses, as their evidence tended to show, that the note was different from what it represented itself to be, the condition of the parties to it reversed, and their liabilities different; and because the evidence went to show a fraud committed on the indorsee, as to the foundation and origin of the instrument in its creation, and a fraud in passing it to them, and shall not be received to impeach that which they gave currency to by their names.

But were they incompetent witnesses, because they were interested? It is true, they would be equally liable to the plaintiffs and

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defendant for the debt and interest: but, if *Thomas Walker* is cast in this action, he could recover from them, not only that amount, but all his costs and expenses in the action: whereas, if the Bank is cast, only the amount of debt and interest, and not the costs of this action could be recovered by the Bank from them: and whether this liability for costs makes any difference, destroys the equilibrium of interest in the event, is the question.

There has been diversity of opinion and decisions; for in *Ilderton v. Atkinson*, 7 T.R. 480, and *Birt v. Kershaw*, 2 East. 458, it was decided, that an indorser on a note, who has received the money from the drawer, in an action by the indorsee against him, may be admitted to prove payment of the note, being either way liable on the note; if the action was defeated, to the plaintiff on the note, or to the defendant in an action for not indemnifying, if the action succeeded, and his being liable in the latter case to compensate the defendant for the costs accrued in the action by such non payment, made no difference. But in *Jones v. Brook*, 4 Taunt. 464, in action against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer was held not a competent witness, to prove the holder came to the bill on a usurious consideration, because he does not stand differently both to the holder and acceptor; for the holder can only recover against him the contents of the bill; but the acceptor is entitled to recover both the amount of the bill, and all the damages he may have sustained, including the costs of the action against him. And *Phillips* in his *Treatise on Evidence*, 47, considers the law now so settled, and indeed, it is consistent with common sense, and the inflexible rule of evidence, that interest in the event of the suit disqualifies. But if the bond given to *Walker*, was a bond of indemnity, it certainly is adding to the *quantum* of damages the amount of the costs. In *Cowles v. Wilcox*, 4 Day. 108, in an action against the indorser of a promissory note, the maker, for whose accommodation the defendant indorsed the note, and who had executed a mortgage to the defendant as security, was held to be an inadmissible witness for the defendant, to support the defence, being interested in the defence of the suit. The ground of defence here, and in accordance with that was the opinion of the court, was, that the case must not be determined on principles regulating negotiable instruments, but the relation of debtors, principal and sureties; that *Walker* was only the surety, and *Walker & George* the principals. If so, then *Riddle v. Moss*, 7 Cranch, 306, decides that question. For it was determined, that the principal obligor in a bond, is not a competent witness for the surety in an action on that bond, the principal being liable to the surety for costs, in case the judgment should be against him. The principal's liability would be increased to the extent of the costs of the suit. On the objection to the witnesses' competency on account of their interest, they should have been rejected.

But admit they were competent, and the defendant had fully

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proved his allegation, and it is but justice to say, that the testimony appears to have been very candidly given, and to bear the impress of truth, did that discharge him in point of law? I think not. There is one circumstance, and that not an unimportant one, which distinguishes this from all the cases that the counsel for the defendant has relied on. The defendant took for security his bond of indemnity, when he gave this note to *Walker & George*; the bond was given in exchange for the note; he retains this security, and though it may be but a slender one, he thought it sufficient when he accepted it. But dismissing that consideration, how stands it, on the instrument, and on the indorsement? The drawer of a promissory note, and the acceptor of a bill of exchange, stand in the same situation. The acceptor of the bill, and the drawer of the note, are in the light of principals, the indorsers of securities. On the face of the instrument *Thomas Walker* was the principal, *Walker & George* the securities, when they indorsed it: *T. Walker* the primary debtor, *Walker & George* collaterals. When the note was indorsed, it passed into the defendants hands, as a business note; it was drawn in that form: it was negotiated in that form; it assumed that shape to serve the purpose of *Walker & George*. No communication to the bank when they discounted and paid the money to *Walker & George*, that it was an accommodation note. The respective rights and liabilities of the parties, taking the note by what it represented itself to be, were then fixed. It is clear, that nothing but satisfaction of the debt, or absolute renunciation of it, could discharge the drawer. Time given to the drawer, might discharge the indorser. Notice of non-payment not being given to him might have the same effect: but time given to the indorser could not discharge the drawer. Notice of non-payment by the indorser was not necessary; it was his business to look to the payment. *Luxton v. Peat*, 2 *Campb.* 185, to which the defendant in error has clung, will afford him no sanctuary; for that was decided on the very principle, that when the indorsement was made, the indorser knew it was without consideration. It was within the knowledge of all the parties, that the bill was an accommodation bill, and the acceptor security only; but here all is the reverse. But that *nisi prius* decision has been abandoned, overruled, and considered to be one of the very few mistakes made by Lord ELLENBOROUGH, at *nisi prius*. *Fentum v. Pocock*, 5 *Taunt.* 192. 1 *Serg. & Rawle*, Ab. 72. 1 *Marshall's Rep.* 14. And in that case, that the error might be done away, the court took pains to put the matter to rest, and to settle the law on some firm basis. That decision was, that if the holder of a bill of exchange, accepted for accommodation of drawer, takes a *cognovit* from the drawer payable by instalments, that does not discharge the acceptor; and that it would subvert and pervert the situation of the parties, to make the acceptor merely a surety. Here the person taking it did not know that it was an accommodation bill; and if he did not then know it,

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what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration? But Chief Justice MANSFIELD said, it was better not to rest the case on that foundation, for it appeared to him, that if the holder had known in the clearest manner, at the time of taking it, it was an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value, or to serve a friend, makes himself liable at all events as acceptor, and nothing can discharge him but payment, or a release. And to this, HEATH, Justice added, denying the authority of Lord ELLENBOROUGH's decision in *Campbell's Reports*, whoever draws an accommodation bill, and procures another to accept it, and negotiates it without letting the person know to whom he passes it, that it is an accommodation bill, is guilty of a gross fraud, and the holder shall not be in a worse situation for the fraud practised on him. And in 5 *Taunt.* 551. 1 *Serg. & Rawle*, 184. 1 *Marsh.* 207. *Carstairs v. Rolleston*. If A. gives B., without consideration, a promissory note, to be negotiated by B. as a security for money, and the indorsee for a valuable consideration, without notice, releases B. from the note, and all claim on it, this does not so extinguish the consideration of the note, but that the indorsee may still recover against the maker: but the court would give no opinion, what might be the case on a note, where the holder originally had notice it was given without consideration: and *Chitty* in his *Treatise on Bills*, (*Judge Story's Ed.* 312,) says, that the case of *Fentum v. Pocock*, is now the settled doctrine. Judge STORY has subjoined, in a note, all the cases on the subject. These clearly establish, that in this respect there is no distinction between bills and notes in the ordinary course of business, and accommodation paper. Lord Chancellor ELDON speaks of the decision in *Fentum v. Pocock*, with entire approbation: he observes, the principle, with a view to the benefit of commercial intercourse, is a very wholesome one: you will not inquire into the knowledge of the parties, but all shall be taken according to the natural effect of the bill, as appears on the face of it, and never to hold that the acceptor was not first liable. 6 *Dow*, 287.

Laxton v. Peat, is the only case in which it was ever held, that time given to the drawer discharged the acceptor, even on an accommodation bill, and against this solitary decision at *Nisi Prius*, we have the union of sentiment, and decision of Chief Justice MANSFIELD, Justices GIBBS and HEATH, Lord Chancellor ELDON, and all the Barons of the Exchequer, and CHAMBRE, J. Time given by an indorser to payee does not discharge the drawer. *Claridge v. Dalton*, 4 *M. & S.* 226.

But in addition to all these authorities, we have the case almost *literatim* decided. For in *Perfect v. Musgrave*, where the holder of a note drawn by two jointly, received a compensation of 10 shillings in the pound, from one of the makers, held that the other, although he had entered into the note as a mere surety, and which

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was understood at the time, was not discharged by the receipt of such composition, or by the want of early application to him when the note became due. 6 *Price's Ex. Rep.* 111.

The court cannot listen to the suggestion so pathetically urged on their attention, that *T. Walker* was not a man of business, or mercantile knowledge, and unacquainted with the legal consequences of what he did. The law knows no standard by which to measure the size of men's understanding but one, and that is, had the party reason and understanding sufficient to enter into any binding contract: if he had, he is bound by its legal consequences.

Great perils always environ the man who meddles with accommodation paper. It is always attended with trouble: frequently with risk to him who lends his name. The man who, to serve his friend lends his name, as his debtor, in order that he may obtain money on that evidence of debt, cannot complain of it as a grievance, that when this purpose is answered, the law will consider him just in the character he has assumed. If drawer, to be treated as drawer; if indorser, as indorser. As he chose to be introduced into the world by the name and in the character of drawer, he must be content to pass through in all its stages under that name, and he cannot, at his pleasure, cast it off, and deny it to any who has given credit to the paper on his assumed name and character. To such person he is bound by every obligation of justice and morality, to sustain the character he has held himself out to be. He shall not be permitted to allege that this was an imposition, to which he gave his name, nor to gainsay its reality by proof, that it was a fiction. There is in equity an estoppel much more conscientious than many legal estoppels, and this is an estoppel of that kind. Fictions in law are only permitted to support the justice and truth of the case, but are never permitted to prevail against justice and against truth. It never can be a just defence, or an equitable bar to a claim, when the very foundation of the defence is, in reality, the substantiation of a falsehood, of which the author seeks to take advantage, and to relieve himself from his own obligation, and for which the holder has *bona fide* paid the full value. It shall be taken *pro veritate*, that he was the drawer, for *de veritate*, that was the very thing he was intended to be. He gave his note, payable to his friends, to enable them to raise money on the security of his name as a drawer at the bank, for the note is payable there, and when it has served that purpose, it cannot be endured that he shall say, he was not the drawer.

But here *T. Walker* knew the consequences, and took his security. But whether he did, or did not, matters not; the contract is not impeached on the weakness of his understanding.

The charge of the court was, therefore, erroneous. The cause was to be decided on the principle of the instrument being negotiable and negotiated, and the acts of the Bank did not discharge *T. Walker* the drawer, neither the acts of omission or commission.

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They omitted nothing. This bank was not bound to give him notice of non payment of his own note. Nor did the time given to the payees, nor the receipt of interest from them release the defendant from his obligation as drawer.

Judgment reversed, and *venire facias de novo* awarded.

[PHILADELPHIA, MARCH, 10, 1823.]

ANDREWS *against* ALLEN.

IN ERROR.

Assumpsit does not lie by one partner against another, unless there be an account actually settled between themselves and a balance struck. It is not sufficient that the balance may be deduced from the partnership books.

ERROR to the District Court for the city and county of *Philadelphia*, in an action of *assumpsit*, brought by *Joseph Andrews* against *Lewis Allen*, in which a verdict and judgment were had for the defendant. By the bill of exceptions to the charge of the court, returned with the record, the case appeared to be as follows:

Joseph Andrews, the plaintiff, entered into articles of copartnership with *Lewis Allen*, the defendant, for the term of five years from the 31st *May*, 1815. *Andrews* was to put into the stock 8000 dollars, and *Allen* 2000 dollars; so that the capital of the partnership would be 10,000 dollars; which was to be at the *joint and equal risque of both parties*. Neither partner was to take out more than 100 dollars a month, and each was immediately to charge himself in the partnership books, with what he took out, which, at the next settlement of accounts, was to be considered as part of his share of the profits. Annual settlements were to be made, and the profits equally divided between the parties. At the expiration of the term of five years, a final settlement was to be made, and all debts being paid, *Andrews* was to take the 8000 dollars, which he had put in, and *Allen* the amount of what he had put in; after which the balance of the stock was to be equally divided between them. On the 10th *October*, 1816, the partners being insolvent, made a general assignment of the stock in trade, debts and effects of the partnership for the benefit of their creditors, who on the same day executed releases to them. On the 16th of the same month of *October*, notice was given by public advertisement, that the partnership was dissolved by mutual consent. The debts due from the partnership were upwards of 30,000 dollars. The effects where sufficient, after satisfying certain debts which had a preference by the terms of the assignment, to pay 41 per cent on the amount of the debts of the general creditors.

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The plaintiff claimed 2900 dollars 6 cents, the one half of 5800 dollars 12 cents, which, he alleged, appeared by the settlement of the partnership books, to be due to him by the firm. This claim was founded on the ground of the defendant's having taken out of the firm so much more than the plaintiff, as to leave that balance in favour of the plaintiff on the final settlement of the partnership accounts: and he claimed also on the ground specifically of having paid into the concern a bill of exchange for 6000 dollars, which the defendant drew on the plaintiff and received the amount of, before the articles of partnership. The declaration contained counts for money had and received, *insimul computassent*, and a count on the bill of exchange.

The court below charged as follows:

The partnership effects assigned were, the stock of the firm in trade, the debts and effects of the partnership. At the dissolution of the partnership, after its debts were paid, each party was entitled to his stock put in; but if there were not enough to pay the debts, the stock of both partners must go to the creditors; and then, if this stock were assigned as the partnership effects, how could the plaintiff be entitled to it? In the judgment of the court, he is not so entitled. It was argued for the plaintiff, that this balance of account of \$ 5800 dollars and 12 cents did not pass to the assignees, but was a private debt due to the plaintiff from the firm of *Andrews & Allen*. But it was stock put into trade for joint benefit, and instantly liable for the debts of the partnership; nor could the plaintiff take it out till the debts of the firm were first paid. According to the articles of association, the capital was at the joint and equal risk of the parties, and after all the partnership debts were paid, each should take his stock, but not before, nor till the debts were first paid. Now the partnership was unable to pay its debts, and assigned all the partnership effects; and surely the stock passed under and by that assignment. If the plaintiff has been injured, as he complains, by the defendants' drawing out of the stock put in, his remedy is on the covenant, if he has any remedy, which is very questionable. It is the creditors who have been injured; for if *Allen* had not withdrawn the funds, they would have had the benefit of them. *Allen* certainly has no money of the firm in his hands; and he did not undertake, in case of loss, to make good *Andrews's* capital to him. Wherefore he cannot recover in this action

As to the demand as upon an account stated or settled between those parties; it is true, that after the dissolution of a partnership, one partner may have an action of assumpsit against the other for such a balance. In this case the partnership was dissolved, and all its debts paid or released; and by the account appearing in the books, it is said, that a balance is due from the defendant to the plaintiff. But the question is, whether an account so appearing is such a stated account, or so balanced, as that an action of *assump-*

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sit may be maintained on it. The accounts are stated between the respective parties, and the firm, not between *Joseph Andrews* and *Lewis Allen*; and this action is for one half of the balance due from the firm to one of the members of it, namely, *Joseph Andrews*. But an account stated or balanced as this one appears to be by the books, is not such an account stated as will raise a promise or assumpsit.

With respect to the bill of exchange, to which one part of the plaintiff's declaration is made applicable, the money proceeding from it was placed by the defendant to the credit of the firm, without objection from the plaintiff, and the court does not think that on that point, the action can be sustained, as argued for the plaintiff.

The plaintiff excepted to the charge of the court.

Two questions were argued in this court. 1. Whether the defendant was liable at all to the plaintiff under circumstances of the case. 2. Whether the plaintiff could maintain assumpsit. But as this court gave an opinion only on the latter, the argument on the former is omitted.

Phillips and *C. J. Ingersoll*, for the plaintiff, contended, that the form of action was proper, account render being necessary only where there is an account to be settled between the partners: whereas, here, the account has been settled from the partnership books, and the balance appears. No express promise is necessary. They cited *Morris v. Pugh*, 3 Burr. 1241. *Gill v Kuhn*, 3 Serg. & Rawle, 333. *Smith v. Burrow*, 2 T. R. 476. *Foster v. Allenson*, 2 T. & R. 479. *Meriwether v. Nixon*, 8 T. R. 186. *Osborn v. Harper*, 5 East. 225. *Ex parte Williams*, 11 Vez. 5. 3 Vez. and Beams, 36.

J. R. Ingersoll and *Chauncey*, contra, insisted, that the only actions the plaintiff could maintain were either covenant on the articles of co-partnership, or account render. Assumpsit cannot be maintained by one partner against another, unless there be an account stated, and a balance struck by themselves, which had never been the case here. *Ozeas v. Johnson*, 1 Binn. 191. *Moravia v. Levy*, 2 T. R. 483. *Foster v. Allenson*, 2 T. & R. 479. *Carey v. Baush*, 3 Caines, 293.

The opinion of the court was delivered by

TILGHMAN, C. J. On the trial in the District Court, the jury were charged, that the plaintiff was not entitled to recover, for which various reasons were assigned. To this charge, the counsel for the plaintiff excepted, and the cause has been brought before this court by writ of error. It is unnecessary to consider all the reasons given by the District Court in support of its opinion, because if it appears that for *any reason*, the action is not maintainable, the judgment must be affirmed. Now there is one reason against the action, which is irresistible. These partners had never

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come to a final settlement of their accounts. And in such case the proper action is account render—assumpsit will not lie. The plaintiff alleges that the balance may be deduced from the partnership books. But that is not sufficient. An actual settlement must be made and a balance struck, by the act of both parties, before either can be charged in an action of assumpsit. It is very possible that the books may not show the true state of the account. There may be false entries, or omissions, so that nothing certain can be deduced from calculations made by one partner, on the entries appearing on the face of the book, without the concurrence of the other. There should be a settlement in which both concur. Otherwise the proper remedy is account render. So was the law laid down in the case of *Ozeas v. Johnson*, 1 *Binn.* 191, which has never been departed from. It will be found that this principle of *Ozeas v. Johnson*, is in accordance with the case of *Foster v. Allanson*, 2 *T. Rep.* 479, and *Moravia v. Levy*, cited in the note to 2 *T. Rep.* 483. I am of opinion, therefore, that the judgment of the District Court should be affirmed.

Judgment affirmed.

[PHILADELPHIA, MARCH 24, 1823.]

NORTH, Sheriff, and others *against* TURNER and others.

IN ERROR.

A plaintiff on the record, in an action of trespass *de bonis asportatis*, may assign his interest, and become a witness. But, it seems, that a plaintiff in slander, assault and battery, or criminal conversation could not.

An assent to an assignment to absent persons will be presumed, where it is made for a valuable consideration, and is beneficial to them.

A plaintiff on record, after assignment of his interest, may be a witness, on paying sufficient to cover all the costs that have accrued or may accrue, without an express stipulation, not to claim any return.

An assignment of personal property, by which the right of property passes, draws after it a constructive possession, on which the assignee may maintain trespass.

ERROR to the District Court of the city and county of *Philadelphia*. *John Turner, Jr., Samuel Humphreys, and Bernard Fitzsimmons*, brought this action of trespass *vi et armis*, against *Caleb North, Thomas Elliot, Henry Engles, and John Graham*, for taking and carrying away 300 barrels of tar, 200 barrels of rosin, and 50 barrels of turpentine, the property of the plaintiffs: to which the defendants pleaded not guilty. A verdict and judgment were rendered in the court below, for the plaintiffs *Turner*, and others.

The property set out in the declaration, had been levied on by two of the defendants, *Elliot* and *Engles*, who were Sheriff's officers, on the 21st of *March*, 1820, under a *feri facias*, issued

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from the Supreme Court, at the suit of *John Graham* against *George W. Fowle*, which came o the Sheriff's hands, on the same day; and the property was afterwards sold under the *fieri facias*.

In order to prove that the property was not in *Fowle*, but in the plaintiffs, the plaintiffs offered *John Turner, Jr.* one of the plaintiffs, as a witness, having first paid the costs of the suit, by *Turner's* check for 25 dollars; and having produced an assignment, dated 18th *October*, 1821, from the plaintiffs to *Richard Goodwin* and *Asa Jones*, of their claim against the defendants jointly, or personally, for damages sustained by, or in consequence of their acts, or any of their acts, and also of all such sums of money as might result from the trial of the suit, or on a compromise of the same, or in any other manner; *Richard Goodwin* to receive 9-13ths, and *Asa Jones* the residue. No evidence was given to show, that *Goodwin* and *Jones* knew of, or had ever accepted the assignment. It appeared by *Turner's* evidence, that *Goodwin* and *Jones* were the consignors to *Turner & Co.* of the tar and rosin; and an entry on the record showed, that the action had been marked on the 18th *October*, 1821, to the use of *Richard Goodwin* and *Jones*. The defendants objected to *Turner's* competency as a witness, but the court overruled the objection, and sealed a bill of exceptions.

In relation to the question who owned the property at the time of the levy, there was evidence to show, that *Fowle*, on the morning of the 21st of *March*, 1820, gave to *Turner* a paper, in these words:

Philadelphia, March 20th, 1820.

Messrs. *Jno. Turner & Co.*

Bought of *George M. Fowle & Co.*

The following, now on board the ship *Howard*.

300 Barrels <i>Suffolk</i> Tar, at \$3,	-	-	-	-	\$900
200 Do. Rosin, 2,	.	-	-	-	400
					\$1,300
50 Barrels Turpentine, at \$2 2½,	-	-	-	-	112
					\$1,412

Received payment this day,

George M. Fowle & Co.

Witness *Philip Meser*.

This paper, *Turner* swore, had been prepared the day of its date. The plaintiffs held *Fowle's* notes, and *Fowle* being unable to take them up, resold to them, the tar and rosin, which he had bought from them, and added the turpentine. The goods were sold on board the *Howard*, which had been freighted by *Fowle* from *Mr. Hemphill*, and no possession was ever had of the goods by the plaintiffs under the above papers. There was contradictory evi-

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dence as to the exact time, at which this paper was delivered on the 21st *March*. It was, however, early in the morning. There was doubt also of the moment when the levy was actually made. The officers were in possession early in the day. The court below charged the jury as follows:

There is but one question in this cause. Was the levy under the the execution at the suit of *John Graham* upon these goods legal? The property once belonged to *Turner & Co.*, and was by that house sold to *George M. Fowle & Co.*, who gave their notes for the payment of the price of the property. Becoming embarrassed, *Fowle & Co.* proposed to transfer the property purchased from *Turner & Co.* to them, and to add to it as an indemnity for loss and expenses, the 50 barrels of turpentine, purchased from *Snowden* and *Wagner*. This proposal was, in the part of *Fowle & Co.*, honourable and praise worthy. It was the most correct course which, under the circumstances of the case, would be adopted. The bargain was concluded on the 20th of *March*, and the bill of sale was then made out: but as *Fowle's* notes were still in the possession of *Turner & Co.*, it was necessary that he should use the precaution, not to give the bill of sale, until the notes were given up, as they were in bank, and the bank was closed, this could not be done, nor the bill of sale delivered until the next morning.

The question is, which had the priority in point of time, the completion of the bill of sale, or the delivery of the execution to the Sheriff? (The court then stated the evidence and proceeded). If you think the bill of sale was completed, and delivered, before the execution was delivered at the Sheriff's office, that settles the case, so far for the plaintiffs.

It has been said by the counsel for the defendants, that the bill of sale was inoperative, because possession of the goods was not delivered before the levy was made under the execution. The rule, that a bill of sale must be accompanied with delivery of possession, is liable to many exceptions. For instance, the case of a ship at sea, where the delivery of the grand bill of sale is sufficient. So too, the case cited by the plaintiffs counsel, from *Massachusetts Reports*, of logs in the canal.

The law will not require impossibilities. We think, that in the present case, there was a sufficient delivery of possession. The captain of the *Howard* was the agent of *Fowle & Co.*, and held the goods as their agent, and upon the execution of the bill of sale, he became the agent of *Turner & Co.*, and was in possession for them. And this is corroborated by the conversation in *Dock Street*, between *John Turner, Jr.* and *Mr. Hemphill*. *Hemphill* had a lien on the goods for his freight, and to satisfy him touching the freight, *Turner* offered to let the goods go on in the ship, if she went on the voyage. This was an act of ownership. We think the delivery sufficient.

It has been said, trespass *vi et armis* will not lie, that it was not

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such a possession as will support this form of action. We think the action well brought.

This is not a case of exemplary damages. There was no appearance of oppression, or misconduct, on the part of the Sheriff. On the other hand, the position of the defendants counsel is altogether unfounded, that you must be confined to the amount produced by the Sheriff's sale. The proper criterion is the value of the goods; of the property illegally seized; and you may add reasonable expenses, and interest from the day of seizure.

This charge was excepted to by the defendants. The jury gave a verdict for the plaintiffs for 1,55 dollars 75 cents.

The following errors were assigned:

1st. That *Turner* was an incompetent witness.

2d. That the action for trespass was not maintainable.

Scott and *Phillips* for the plaintiffs in error.

1st. Although it was decided in *Steele v. The Phoenix Insurance Company*, that a plaintiff may make himself a witness, by assigning all interest in the suit, provided the costs are previously paid, yet the present case is distinguishable in this, that the interest of the plaintiffs in this action of trespass, was not assignable. *Steele v. The Phoenix Insurance Company*, was the case of an assignment of the plaintiffs interest in a policy of insurance, a matter of contract; but in this, it is a transfer of a claim founded on a tort, in which damages are to be recovered. The action would have abated by the death of the plaintiff but for the provisions of the statute, 4 Ed. III. c. 7. A claim either a debt, or to uncertain damages, is not considered as a chose in action, unless it arise out of contract express or implied. 2 Bl. Com. 396. In *Sommer v. Wilt*, 4 Serg. & Rawle, 28, DUNCAN, J. say, that an action on the case for malicious abuse of process, is not the subject of assignment, under the insolvent debtor's act; it is neither estate, credit, nor effects: it is a personal action, which would die with the person. Suppose an action of slander, or assault and battery: would the court permit the plaintiff in such suits, to assign the cause of action, and then become a witness? The rule, as already established, has a tendency to encourage fraud: but it would be much more dangerous, to extend it to actions of tort. Besides, it was not shown, that the assignment had ever been accepted by *Goodwin* and *Jones*, or that it was known to them: the plaintiffs kept it in their own possession. It cannot be presumed that they would accept it, because *Turner & Co.*, by giving up *Bowle's* notes, became themselves responsible for the value. Although *Turner* deposited the costs, yet there is nothing to prevent his recovering them back; he might recover them of *Goodwin* and *Jones*, as money paid to their use. There ought to have been a stipulation, that they should in no event be restored to the plaintiff *Patton's Administrators v. Ash*, 3 Serg. & Rawle, 303.

2d. As to the form of action. The property, when seized by

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the Sheriff, was on board a vessel, where it had been placed by *Fowle* for exportation. We say, that possession had never been taken by the plaintiffs, and therefore, they could not support trespass. *Esp. Ev.* 214. 8 *Johns.* 435. 11 *Johns.* 377. 12 *Johns.* 348.

Kittera, contra.

1st. It is objected that this action was not assignable, not being a chose in action. *Jacobs*, in his *Dict. Tit. Chose*, says, a right to sue for goods which have been taken, is a chose in action. And though the form of the action is trespass, it is to recover the value of the goods, as much as trover. As to the non-acceptance of the assignment, it was in the hands of the counsel for *Goodwin* and *Jones*, for some weeks before the trial. In *Smith v. The Bank of Washington*, 5 *Serg. & Rawle*, 38, an assignment of bank stock was made by a witness, at the trial, to his daughter, then at a distance, and delivered to the cashier for her use, and the witness was held competent. The objection in relation to the costs, is equally without weight: for where the costs are paid, in order to let in the plaintiff as a witness, it is always understood, that they are in no event to be recovered back.

2d. Trespass was the proper form of action. Constructive possession is sufficient to support trespass, and the right of property draws after it the constructive possession. 6 *Bac. Ab.* 563. Thus, if the owner of goods at a distance, give them to J. S., and before J. S. have obtained the actual possession, a stranger take them, J. S. may maintain an action of trespass against the stranger: for by the gift, he acquired a general property in the goods. *Bro. Ab. Tresp. Pl.* 303, *Latch*, 214. In *Dawes v. Jolk*, 4 *Binn.* 258, it is said, that where the delivery of possession is impossible, all that is required is to deliver such possession as the nature of the thing admits of. He also cited 12 *Mass. Rep.* 300 *Selw. N. P.* 1105. *Allen v. Smith*, 10 *Mass. Rep.* 309.

The opinion of the court was delivered by

GIBSON, J. *Steele v. The Phoenix Insurance Company*, decides the point, that no objection lies to the competency of a witness, because he is a plaintiff on the record, and was the real party in interest when the suit was brought, if he has in the mean time divested himself of all the interest which he had in the subject of the action. But as this is an action of trespass *de bonis asportatis*, it is urged that the property in the damages expected to be recovered, being for a mere *tort*, is so peculiarly attached to the person as to be inseparable from it; and consequently, that the interest of the plaintiffs in the subject of the suit, could not be assigned, because, before an actual recovery of damages, there was nothing for an assignment to operate upon. There are, undoubtedly, some injuries which so peculiarly adhere to the person of him who has suffered them, as to preclude an assignment of his claim to compensation for them, so as to make him a witness: such, for instance, as slan-

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der, assault and battery, criminal conversation with the party's wife, and many others that might be mentioned; the right to compensation for any of these, would not pass by a statute of bankruptcy, or an assignment under the insolvent acts, nor could it be transmitted to executors or administrators. But this does not hold with respect to a trespass committed against a party's goods, the remedy for which survives to the personal representative, by the statute 4 E. 3, c. 7; which clearly shows, that such a cause of action is separable from the person of the owner; and it cannot be doubted, that it would pass by a commission of bankruptcy; for, before actual recovery of damages for the trespass, the property, in the goods themselves, remains in the original owner, or those who represent him. The subject matter of the demand, therefore, being clearly assignable, the objection on that ground cannot be sustained.

It is further objected, that there was nothing to show, that the assignment was accepted by *Goodwin* and *Jones*, or that they ever knew of it. On this part of the case, the bill of exceptions is not explicit, but enough appears to show that the plaintiffs below, had received these very goods from *Goodwin* and *Jones*, on consignment; and the assignment of the action to them was, therefore, for a valuable consideration; and as it was beneficial to *Goodwin* and *Jones*, their assent must be presumed. This principle was fully decided in *Smith v. The Bank of Washington*, 5 Serg. & Rawle, 318.

Another ground of objection is, that although a sufficient sum to cover all the costs that had accrued, or might accrue, was paid in the cause, yet as the plaintiff did not expressly stipulate, not to claim a return of any part of the costs so paid, in case of a verdict against the defendant, there was still an existing interest in the witness, who being liable for costs, would divest himself of it only by an absolute and unconditional payment of all the costs in the suit. This objection is rested on an expression of the Chief Justice in *Ash v. Patton's, Admrs.* 3 Serg. & Rawle, 300, but it is not there said, that the stipulation must be express. The very act of paying costs to remove a disqualification on account of interest, includes in it a stipulation, that the costs are paid on conditions which are to have the effect of completely removing the interest objected to: and a payment on terms which, in case of a verdict against the adverse party, would enable the party on the record, to get something back, could not have that effect: his interest in promoting a recovery would remain. Then, for what purpose insist on having an express stipulation on the record? In taxing the bill, the court would inquire into the conditions on which the costs were paid, and be governed by a consideration of the fact, that they had been paid actually to divest the party of interest, so as to make him a competent witness. But the very point was determined in *Conrad v. Keyser*, 5 Serg. & Rawle, 370, where it is said, that the act of payment is itself, a stipulation.

(North, Sheriff, and others v. Turner and others.)

The error assigned, with respect to the charge, cannot be sustained. The re-assignment of the property by *Fowle & Co.* to the plaintiffs on the record, vested the title in them, and gave them a right to immediate possession. This right of property drew after it a constructive possession, which is all that is necessary to sustain an action of trespass. The judgment, therefore, is affirmed.

Judgment affirmed.

[PHILADELPHIA, MARCH 24, 1823.]

Commonwealth *ex relatione* PATTON and another *against* The Commissioners of the County of Philadelphia.

MANDAMUS.

The compensation to the Auditors of the county of *Philadelphia*, for settling the accounts of the guardians of the poor of the city and districts, is to be paid out of the county treasury.

THIS case was argued by *Mahany* for the relators, and *Peters* for the defendants.

The opinion of the court was delivered by

TILGHMAN, C. J. A rule having been laid on the commissioners of the county of *Philadelphia*, "to show cause why a mandamus should not be issued, commanding them to pay to *Samuel Patton* 88 dollars, and to *John Roberts* 84 dollars; the sums respectively due to them, as Auditors of the county of *Philadelphia*, for auditing and settling the accounts of the Guardians of the Poor, and Managers of the Almshouse of the city of *Philadelphia*, the district of *Southwark* and township of the *Northern Liberties*, agreeably to the provisions of the act of assembly, passed the 30th *March*, 1791, and in conformity with the directions of the act of assembly, passed the 2d *April*, 1821," the commissioners have shown for cause against the mandamus, "that they are not liable by law to pay the money claimed by the Auditors of the county of *Philadelphia*, the services for which the money claimed as a compensation, having been performed for the *Guardians of the Poor of the city of Philadelphia, the district of Southwark, and the township of the Northern Liberties.*

The question is, whether the commissioners of the county of *Philadelphia* are bound to pay the auditors, the compensation demanded by them, for auditing and settling the accounts of the guardians of the poor, &c. and to form a judgment on this question, it will be necessary to consider several acts of assembly, by which an allowance is made to the auditors for their services. By the act 30th *March*, 1791, the auditors were directed to audit the accounts of the county commissioners, and were allowed ten shillings per

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day respectively, while employed in the said business, together with such other incidental and unavoidable expenses as the county court should think reasonable, *to be paid out of the county stock.* (3 Sm. L. 17. sect. 8.) By the act 16th March, 1809, the auditors, who had before been appointed by the court, were to be elected by the people, and each of them was to be allowed *out of the county stock*, the sum of one dollar and thirty-three cents, and no more, *for every day's attendance on the duties of his office,* (5 Sm. L. 19. sect. 3. By the act of 20th March, 1810, sect. 2. (5 Sm. L. 161.) it was made the duty of the auditors, to settle and adjust the accounts of all moneys received by the sheriff or coroners, agreeably to an act directing the mode of selecting and returning jurors. Nothing is said about compensation for this new duty imposed on the auditors; not because they were to receive no compensation for this additional service, but because the compensation was provided for by the act of 16th March, 1809, which gave them one dollar and thirty-three cents, *for every day's attendance on the duties of their office.* By the act of 31st March, 1812, the duty of the commissioners was increased, by the settlement of the accounts of the *Board of Health.* (5 Sm. L. 372. sect. 5.) This act too, was silent as to compensation, for the reason before assigned. By the act 21st February, 1814, the auditors were allowed sixty-seven cents per day, for every day they should attend their respective duties, in addition to the pay allowed them before, (*Purd. Dig.* 111.) By the act of 18th January, 1821, sect. 6. (7 State L. 345,) the pay of the auditors of the several counties, was fixed, at the rate of one dollar and fifty cents per day, and no more, to be paid out of the *county treasury, for every day they shall necessarily attend their respective duties*, except in the city and county of *Philadelphia*, where the pay was to be two dollars per day. Then came the act of 2d April, 1821, by which it was made the duty of the auditors of the county of *Philadelphia*, "to audit and adjust and settle the accounts of the guardians of the poor of the city of *Philadelphia*, the district of *Southwark*, and township of the *Northern Liberties*, and of the inspectors of the prison. No mention is made of compensation, so that those heavy additional services must go without compensation, unless the case is included in the provisions of the former acts, which give a per diem allowance for every day in which the auditors are *necessarily attending their respective duties.* I have not the least doubt, that the case is within the provision of the act of 18th January, 1821, the words of which extend to all days in which the auditors shall be attending their duties, whether those duties were imposed by former, or should be imposed by subsequent laws. The legislature might require of the auditors, any services it might think proper, and we see that it had been usual to do so, from time to time. The auditors could not complain of this, because, having a per diem al-

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lowance, the compensation was always adequate to the trouble. But, if the additional services required by the act of 2d April, 1821, were to be without compensation, there would have been great cause to complain. I cannot see the least reason for supposing that the legislature intended to leave these services uncompensated, and the only objection that the counsel for the commissioners has been able to suggest, is, that it is unreasonable, the county of *Philadelphia* should pay for services performed not for the whole county, but for part, viz. the city of *Philadelphia*, the *district of Southwark*, and *township of the Northern Liberties*. There is very little weight in this objection—for, although the services are performed but for *part* of the county, yet it is *much the largest part*. The same thing had been done before, when the duty of settling the accounts of the *Board of Health* was imposed on the auditors. The most that can be said, is, that it would have been more agreeable to strict justice, if the expenses of settling the accounts of the guardians of the poor, &c. had not been thrown on the county at large. And perhaps, upon a representation to the legislature, the law may be altered. But our duty is, not to speculate upon the expediency of the law, but to give it a true construction. For the reasons which I have mentioned, I am well satisfied, that the auditors are entitled to be paid out of the county treasury, and am therefore of opinion that the rule for the mandamus should be made absolute.

Rule absolute.

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[PHILADELPHIA, MARCH, 24, 1823.]

EVANS, Administratrix of EVANS *against* TATEM.

IN ERROR.

A person taking out letters of administration in *Pennsylvania*, may be sued in *Tennessee* for a debt due by the intestate.

An action at law is maintainable in *Pennsylvania*, on a decree of a Court of Equity in *Tennessee* for the payment of money.

In such action the pleas of *nil debet*, and *nul tiel record*, are both bad on general demurrer.

If the defendant mean to deny the existence of such decree, he may frame a plea to meet the averment of the decree in the declaration, and such plea must conclude to the country.

ERROR to the District Court for the city and county of *Philadelphia*.

Howell Tatem, the plaintiff below, brought this action of debt against *Ann Evans*, administratrix of *John B. Evans*, deceased, to recover the sum of 6,239 dollars, and 10 cents, including the amount, with costs, decreed in favour of the plaintiff *Tatem*, against

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the defendant *Ann Evans*, as surviving administratrix of *J. B. Evans*, in the Court of Errors and Appeals, and Court of Equity, for the State of *Tennessee*. The decree was made in that court in a proceeding by *Tatem*, by bill in equity, to which the defendant, *Ann Evans*, appeared and pleaded, and it was thereby ordered, adjudged, and decreed, that she the said *Ann*, administratrix of *J. B. Evans*, deceased, should pay to the said *Tatem*, the sum of 5,949 dollars 60 cents, out of the assets belonging to the estate of the said *J. B. Evans*, deceased, which had come to her hands to be administered, and all the costs of the cause out of said assets in her hands to be administered, and if none, then out of her proper goods and chattels. The defendant pleaded *nil debet*, and *nul tiel record*: to both which pleas, the plaintiff demurred, and the court below gave judgment for the plaintiff. The defendant also pleaded no assets, *plene administravit*, and payment with leave, &c.: to which the plaintiff replied, assets, not fully administered, and *non solvit*, and issues were joined thereon, and a verdict was given on each issue for the plaintiff.

On the trial of these issues in the court below, the defendant, under a previous notice of special matter, and notice to produce the copy of the order, judgment, and decree, upon which the suit was founded, offered to show by evidence, that neither she, nor the intestate, *J. B. Evans*, were at any time indebted, or bound in law or equity, to pay to the plaintiff any sum or sums of money; and also, that the defendant, being administratrix under the law of *Pennsylvania*, and not under the laws of *Tennessee*, and the said order, judgment, and decree, being had or made upon matters alleged to have arisen and existed in the life time of the intestate, she was not, as such, amenable to the authority, or power of a court in *Tennessee*; and that, therefore, the said order, judgment, and decree, were not had or made by any court having jurisdiction in the matter.

And the defendant further offered to show, that from the said decree itself, and the matters therein stated, nothing was due in law or equity, or ought to be paid by the defendant to the plaintiff, and that the same was unjust and unfounded.

And also, that from the matters stated in the decree, as inducing the same, it does not appear on the face of the proceeding and decree, that so much is due to the plaintiff, as by the same is decreed.

But the court below rejected the whole of the evidence so offered, and were of opinion, that the said order, judgment, and decree, were conclusive evidence of the debt in the plaintiff's declaration claimed and could not be controverted, and so gave it in charge to the jury. To which charge the defendant excepted.

Condy, for the plaintiff in error, contended, that a decree of a Court of Chancery was not a record, nor conclusive of the rights of the parties, but might be inquired into in another suit, by evidence extrinsic, or by showing from matters intrinsic, that nothing was

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due in law or equity to the plaintiff, or that so much was not due as was decreed. *Coke*, in 3 *Inst.* 71, defines a record to be, regularly, a monument, or act judicial, before a judge or judges in a court of record, entered in parchment in the right roll; and says, speaking of chancery, that as to the proceeding by English bill, in a course of equity, it is no court of record, for thereupon no writ of error lieth as in other cases. And again in page 123, the court of equity, in the proceeding in a course of equity, is no court of record, and, therefore, it cannot hold plea of any thing whereof judgment is given, which is a judicial matter of record. And in 4 *Inst.* 89, this court of equity proceeding by English bill, is said to be no court of record, and therefore, it can bind but the person only, and neither the estate of the defendant's lands, nor property of his goods or chattels. The same principles are laid down in 4 *Vin. Ab.* 382, *k.* In *Doughty v. Fawn*, *Yelv.* 226. *Brownl.* 117, it was held, that it was issuable and triable by jury, whether there was an order of chancery pleaded by the defendant, or not; for their orders there are only in paper, and are not of record, to be tried by the record, but only by jury. *Gilbert* in his *Treatise on Evidence*, 48, says, the proceedings of the court of chancery on the English side, are not of record; and the reason is, they are not precedents of justice: for the proceedings in chancery are founded only on the circumstances of each private case, and they cannot be rules to any other; and the judgment there is *secundum æquum et bonum*, and not *secundum leges et consuetudines*: and the reason why any record is of validity and authority is, because it is declarative of the sense of the nation, and is a memorial of what is the law of the nation: now chancery proceedings are no memorials of the laws of *England*, because the Chancellor is not bound to proceed according to law. To the same effect are *Bull. N. P.* 235, and 1 *Harr. Ch.* 20. Even the court of chancery itself, does not regard a prior decree as conclusive. Where a new original bill is necessary to carry a decree into execution, the court will examine the grounds of the former decree, before they will make a new one: though in their examination, they will confine themselves to the proofs made in the first decree. 1 *Harr. Ch. Pr.* 148, cites *Lawrence v. Birnie*, 2 *Ch. Rep.* 128. In *West v. Skip*, 1 *Vez.* 145, though the general rule is stated to be, that on a bill to carry a former decree into execution, the court can only do that, and not vary; yet there are several instances wherein the court has considered the directions, and whether there was any mistake; and it was done in that case. To give this decree in a court of equity, therefore, the conclusive effect contended for, would be to give it a more binding efficacy than a court of chancery, in the same state, would allow it. They would examine into any mistake appearing on its proceedings: but the court below, in this case, would not allow us to show error on the face of the proceedings.

2d. No action at law lies on a decree in chancery. That court

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proceeds on the special circumstances of each particular case, founded on principles of equity, which a court of law does not recognize, and it makes specific decrees, which it is out of the power of a court of law to enforce. A court of equity only can enforce the decree of another court of equity, and apply the proper redress. It would be a great hardship if the party could come into a court of law, and give the decree, by the forms of proceeding there, a conclusive effect, when it would be liable to be opened by a bill of review, in the same court where it was given. For in the same court the decree is never concluded: it is always in *fieri*, and has no likeness to a judgment at law. Any error in figures may be even corrected by an order: and a bill of review lies on new matter. *Cowp. Eq.* 88, 91. The plaintiff here was not without a remedy, for he ought to have filed his bill on the equity side of the Circuit Court of the *United States*. In the case of *Post v. Neafie*, 3 *Caines*, 22, it is true, it was decided in *New-York*, that debt lies on the decree of a court of chancery in another state, for the payment of money only by the defendant, without any acts to be done by the plaintiff: but it was against the opinion of KENT, J., and by a law of *New-Jersey*, a decree in chancery has the force and effect of a judgment at law: so that it is no authority in case of a decree of an ordinary character. It is stated, however, in page 37, that CHASE, J. had decided in the Circuit Court of *Connecticut*, that an action at law would not lie on a decree in chancery.

3d. *Nil debet*, or *nul tiel record*, were correct pleas in this action, if it be sustainable. The aid of the jury might be necessary to examine facts, and correct errors. If there were no such decree, how was the party in any other way to put that in issue? The plea of no such decree is unprecedented. *Nul tiel record*, was the proper plea for that purpose: and should conclude to the country.

If there were such decree, then the party ought to be allowed to plead *nil debet*, by which he would entitle himself to all the rights he would possess in a proceeding in a court of equity in *Tennessee*. It is the usual and proper plea to debt on a foreign judgment, and under it want of jurisdiction might be shown. It does not contravene the constitution of the *United States*, but admits whatever may be given in evidence in accordance with the constitution.

It is a further objection to this action, that it is upon a proceeding in *Tennessee*, against a person who administered in *Pennsylvania*. It is different from the case of an administrator plaintiff. In *Pennsylvania*, by act of assembly, one who administers in another state may bring suit here; but it does not follow that he may be sued. In the case of the Selectmen of *Boston v. Ward Nicholas Boylston*, 2 *Mass. Rep.* 384, an administrator with the will annexed of one domiciled in *England*, and dying there, came into *Massachusetts*, and took administration there *cum testamento annexo*: he was held not liable to account there for effects received

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by him in *England*. This case is recognized in 5 *Mass. Rep.* 77, and it is held, that an administrator who has not administered in *Massachusetts* is not liable to be sued there, so as to render the real estate liable. One who has obtained administration in another state cannot prosecute or defend an action in *Massachusetts*. *Goodwin v. Jones*, 3 *Mass. Rep.* 514. It is objected, that the defendant pleaded in *Tennessee*: but there is nothing in that: consent cannot give jurisdiction. The assets were all collected in *Pennsylvania*, and held in trust for others. The defendant never was in *Tennessee*. If one administers in another state, and changes his domicil, and comes here, he may be sued here. *Bryan v. McGee* cited *Whart. Dig.* 277. The decree is for payment out of the assets; which must be understood of assets in *Tennessee*.

Rawle, contra.

1. The administrator here was liable in *Tennessee*. In *Swearingen v. Pendleton*, 4 *Serg. & Rawle*, 389, this point was decided, and the opinion of the court below confirmed, that an executor is liable in respect to all the assets which come to his hands, whether they arise in the county where the letters testamentary are granted, or elsewhere in another state, or even in a foreign country, agreeably to *Dowle's case*, 6 *Co.* 46, *b.*, where one administered as executor in *Ireland*, and received assets there, and then came to *England*: he was held liable: for if the executors have any goods of the testator's in any part of the world, they shall be charged in respect to them. No distinction can be drawn between an executor and an administrator in this respect. But it does not appear by the proceedings in *Tennessee*, where the defendant administered. The bill and answer merely state, that administration had been granted to *Ann Evans*, and *Henry Hawkins*, citizens of *Pennsylvania*; the plea put in by *Ann Evans* states her to be surviving administrator of *J. B. Evans*, and does not mention where administration was granted. She appeared voluntarily to the plaintiff's bill, and thereby admitted the jurisdiction, and she is now estopped to deny it. All the cases referred to on the opposite side occurred in *Massachusetts*, where there is an act of the legislature, regulating this matter, and under this act the cases were determined.

2. The plea of *nil debet* to an action on the judgment or decree of the court of another state, is not admissible. This plea opens every thing, even the original cause of action; and would put the plaintiff upon proving that. *Chitt. Plead.* 476, 7. The constitution of the *United States* declares, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every state: and congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof, *Art. 4. Sect. 1.* Congress have accordingly, by the act of *May 26th, 1790, Sect. 1.* enacted, that they shall have such faith and credit given to them in every

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court within the *United States*, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. They have thereby declared the effect of such proceedings: and the result is that the judgment of a state court shall have the same credit, validity, and effect in any state, which it had in the state where it was pronounced: and that whatever plea would be good in a suit thereon in such state and no other can be pleaded. *Serg. Const. Law*, 381, and cases cited. In *Mills v. Duryee*, 7 *Cranch*. 481, in a suit in the *District of Columbia*, upon a judgment in the Supreme Court of *New York*, the plea of *nil debet* was held bad on general demurrer. In *Hampton v. McConnel*, 4 *Wheat*. 234, in debt in the Circuit Court of *South Carolina*, on a judgment in the Supreme Court of *New York*, *nil debet* was held a bad plea. To the same purpose is the case of *Armstrong v. Carson's Executors*, 2 *Dall*. 302. In *Burden v. Fitch*, 15 *Johns*. 144, and *Andrews v. Montgomery*, 19 *Johns*. 162, the Supreme Court of *New York* have held, that a judgment fairly and regularly obtained in another state is conclusive: though it is void, if the court had no jurisdiction. And the same principle was adopted by the Supreme Court of *Massachusetts*, in *Bissel v. Brigs*, 9 *Muss. Rep.* 462. The proceedings here were judicial proceedings within the meaning of the constitution and acts of congress, and therefore equally binding with a record.

3. The plea of *nul tiel record* was altogether improper. The proceedings of the court of equity in *Tennessee* are not called a record in the declaration, and the cases cited on the opposite side abundantly prove, that they were not of the nature of a record. If the defendant meant to deny that there was any such decree, he certainly might plead that there was no such decree: or might plead a want of jurisdiction in the court.

4. Does an action at law lie on a decree of a court of equity? The Court of Chancery in *England* is termed by BLACKSTONE, one "of the King's superior and original courts of justice." 3 *Bl. Com.* 46. A decree in Chancery may be proved by an exemplification under the seal of the court. 1 *Phill. Ev.* 295. Such decree is equal to a judgment at law, so far as concerns the personal estate of the party: and his goods may be sequestered, although the party is in custody upon an attachment for a contempt. 2 *Madd. Ch.* 355. If the decree is prior to a judgment at law, it shall have preference in the administration of assets: and the original demand *transit in rem judicatam*. *For.* 218. *Cas. temp. Talb* 217, 223. The same principle is decided in *Thompson v. Brown*, 4 *Johns. Ch. Cas.* 638. In *Hopkins v. Lee*, 6 *Wheat*. 109, a decree in chancery is said to be as conclusive between the parties as a judgment at law. The inquiry into the merits of an original decree, is but matter of practice: and in *New York* it can only be done by bill of review, *Gelston v. Codwise*, 1 *Johns. Ch.* 189. *Bennet v. Winter*, 2 *Johns. Ch.* 205. The cases cited to show that in *England*, on a bill

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filed to enforce a decree, the court will inquire into the merits of the original decree, do not prove this to be the general rule; and if it were, it does not prove that the complainant may not have his election to proceed at law or equity. By the law of *Tennessee*, the complainant may have an execution on a decree in equity, as on a judgment at common law. Such being the effect of a decree, there is no reason why an action at law should not be maintained on it, where it is simply for the payment of money, which then becomes a debt, 3 *Lev.* 555. Equity is part of our law; and as we have no Court of Chancery, a party recovering a debt by such a decree in another state, would be remediless in the courts of *Pennsylvania*, if the courts of common law refuse to sustain an action. Such action is not without precedent. In 7 *Went. Plead.* there is the form of a declaration on a decree in chancery. And in *Post v. Neafie*, 3 *Caines*, 22, the Supreme Court of *New York*, determined, that an action at law was maintainable there on a decree in chancery in *New Jersey*.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action of debt, brought by *Howell Tatem* the defendant in error, who was plaintiff below, against *Ann Evans*, administratrix of *John B. Evans*, deceased, on a decree in the "Court of Errors and Appeals, and Court of Equity for the state of *Tennessee*," for the sum of 6239 dollars and 10 cents.

The defendant pleaded *nil debet*, and *nul tiel record*, to both which pleas the plaintiff demurred, and judgment was given in his favour. The defendant pleaded also, no assets, *plene administravit*, and payment with leave, &c. to which the plaintiff replied, assets, not fully administered, and *non solvit*; and issues were thereupon joined and a verdict given on each issue for the plaintiff. On the trial of the cause in the court below, the defendant offered to prove, "that neither she, nor her intestate, were, at the time of the said decree, or any time before, indebted, or bound, in law or equity, to pay to the plaintiff any sum or sums of money. Also, that the defendant being an administratrix under the law of *Pennsylvania*, and not of *Tennessee*, and the said decree being made on matter alleged to have arisen and existed in the life time of the intestate, was not, as such, amenable to the authority of a court in *Tennessee*, and therefore the said decree was not made in a court having jurisdiction." The defendant also offered to prove other matters which went to the merits of the case, all of which evidence was rejected by the court. The counsel for the plaintiff in error, argued his case on four points, which I shall now consider.

1. Was the defendant who administered in *Pennsylvania*, liable to a suit in *Tennessee*, for matters which arose in the life time of the intestate? I can perceive no good reason against such a suit, but many in its favour. If a person who administers in one state, and receives assets there, is not sueable on his

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removal to another state, it would produce the greatest injustice. The removal from state to state, is the act of the administrator, which the creditors of the intestate cannot prevent, and therefore should not be prejudiced by it. The assets are to be administered according to the law of the state, within which the administration was granted, and justice requires that the administrator should be liable, to the amount of the assets which have come to his hands in whatever state he may be found. The counsel for the plaintiff in error, admits that the administrator may be sued in another state, provided he has removed there, with intent to make it the place of his permanent residence. But it is immaterial what his intent is. Wherever he goes he carries with him the obligation to administer the assets. So has the law been held from the time of Lord Coke to the present day. In *Dowdle's* 6 Co. 46, it was decided, that one who received letters testamentary in *Ireland*, where assets came to his hands, was liable to a suit in *England*. There is good sense in the following observation of the court, in that case. "If the executors have goods of the testator in any part of the world, they shall be charged in respect of them; for many merchants, and other men, who have stock and goods to a great value beyond sea, are indebted here in *England*; and God forbid that these goods should not be liable for their debts; for otherwise there would be a great defect in the law." The same principle was declared to be law by this court, in the western district in the case of *Swearingen's Executors v. Pendleton's Executors*, 4 Serg. & Rawle, 389. There it was held that a suit might be sustained in *Pennsylvania*, against an executor who had administered in *Virginia*. So that this point may be considered as settled.

2. The second question in this case is, whether the plea of *nil debet* was good? If this plea was good, the merits of the decree of the court of *Tennessee*, might have been contested. On the issue of *nil debet*, every thing is thrown open. In an action of debt on a foreign judgment, the defendant is at liberty to controvert the original cause of action. But, under the constitution of the *United States*, judgments in one state, are not considered, in another, as foreign judgments. In art. 4. sect. 1. of that constitution, it is declared, that "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The congress have exercised the power vested in them by this article, by their act passed the 26th May, 1790, in which, after prescribing the mode of authentication, they declare, "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the *United States*; as they have by law, or usage, in the courts of the state from whence the said re-

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cords are, or shall be, taken." The question then is, what faith and credit would the courts of *Tennessee* have given to this decree in chancery. The answer cannot be doubted. The decree would have been held incontrovertible. The construction of this article of the constitution has been settled by repeated decisions in various courts of various states, as well as in the courts of the *United States*. A judgment in one state, is conclusive in all other states, provided it was rendered by a court having competent jurisdiction. The first decision on this subject, was in the case of *Armstrong v. Carson's Executors*, in the year 1794, in the Circuit Court of the *United States*, held at *Philadelphia*. It was an action of debt on a judgment in the Supreme Court of *New Jersey*. The defendant pleaded *nil debet*, which was held to be a bad plea. In *Bissel v. Brigs*, 9 *Mass.* 462, a suit was brought on a judgment in *New Hampshire*, against an inhabitant of *Boston*, who was arrested in *New Hampshire*, and appeared and pleaded. It was held by the Supreme Court of *Massachusetts*, that by virtue of the constitution and laws of the *United States*, the defendant was concluded by this judgment. It appeared that the court of *New Hampshire* had jurisdiction, and that was the only matter that could be inquired into. In *Mills v. Dur-ye*, 7 *Cranch*. 481, it was decided by the Supreme Court of the *United States*, that *nil debet* was a bad plea, in an action brought in the Circuit Court of the *District of Columbia*, on a judgment of the Supreme Court of *New York*. And the same point was decided in the same manner, by the Supreme Court of the *United States*, in the case of *Hampton v. McConnel*, 4 *Wheat*. 234, which was an action of the Circuit Court of *South Carolina*, on a judgment in the Supreme Court of *New York*. The Supreme Court of *New York*, seems once to have been of opinion, that judgments rendered in one state, were to be considered as *foreign judgments*, and therefore not conclusive, in another. I allude to the case of *Hitchcock v. Aiken*, 1 *Caine's*, 460. But that highly respectable court, on mature reflection has come to the opinion, that a judgment fairly and regularly obtained in one state, is conclusive in another. This will appear from the cases of *Burden v. Fitch*, 15 *Johns.* 144, and *Andrews v. Montgomery*, 19 *Johns.* 162. I have no hesitation, therefore, in concluding, that the plea of *nil debet*, in the case before us, was bad.

3. We come now to the third point, which is, whether the plea of *nil tiel record* was good?

If proceedings in Courts of Chancery are not records, *nil tiel record* was not a good plea. And that such proceedings are not records seems to be well established. In *Gilbert's Law of Evidence*, 49, it is said, that proceedings in chancery by bill and answer, are not records, because they are *secundum æquum et bonum*, and not according to the laws and customs of the realm. In *Buller's Nisi Prius*, 235, we find the same assertion, founded

(Evan, Administratrix of Evans v. Tatem.)

on the same reason. Lord COKE defines a record, to be "a proceeding in a court of justice which has power to hold a plea according to the course of the common law," *Co. Lit.* 260. In the case of *Doughty v. Fawn*, *Yelv.* 226, it was said by the court, that "orders in chancery are not of record, to be tried by the record, but by a jury." It is to be observed, that in the case before the court, the plaintiff's declaration does not call the decree in chancery a record, and if the defendant intended to deny that any such decree existed, he might have framed his plea so as to meet the averment in the declaration; and the tender of the issue should have concluded to the country, according to the case in *Yelverton*. The court below was right therefore in deciding that the plea of *nul tiel record* was bad.

4. The fourth and most difficult question is, whether an action of debt lies in a court of common law, to recover a sum of money ordered to be paid by a decree in chancery.

It is no wonder that little upon this subject is to be found in the *English* books, because in *England*, the Court of Chancery having ample power to enforce its own decrees, there can seldom be occasion to resort to a court of law. The same observation applies to those of our sister states which have courts of chancery. The subject however has sometimes been brought before a court of law in one state, when it has been necessary to proceed on a decree in chancery in another. In *Pennsylvania*, where there is no Court of Chancery, should there be occasion to proceed on a decree in chancery in another state, it must be in a court of law, or not at all. The great objection to an action in a court of law, is, that in general, decrees in chancery are not simply for the payment of a sum of money, but also for something specific, which is ordered to be done, by one party or the other. In such cases there would be great difficulty in supporting an action at law. But the present decree being simply for the payment of money, all other considerations may be thrown aside. It is a general principle, that where a man is under an obligation to pay a *certain sum of money*, whether that obligation is founded on a contract, or the judgment of a court, an action of debt lies. On that principle, we support actions of debt on *foreign* judgments. And I confess, I see no reason why a decree in chancery, is not as strong as a foreign judgment. If it be objected, that proceedings in chancery are not according to the course of the common law, the same objection lies against judgments of courts on the continent of *Europe*, where the proceedings are according to the civil law. To be sure, in case of a foreign judgment, the defendant is permitted to deny the original cause of action. But so likewise would the defendant in the present case have been permitted to enter into the merits of the original controversy, were it not for the constitution and laws of the *United States*, which forbid it. The objection, therefore, of being precluded from contesting the merits of the decree, does not lie against

(Evans, Administratrix of Evans v. Tatem.)

the action of debt, which in its nature did not preclude it, but against the constitution. And as to that, all that can be said is, that although in some instances the conclusiveness of judgments may be inconvenient, yet upon the whole, it produces good; and whether it does or not, this court has no power to alter the constitution. I have said that this subject was not altogether new. It was brought before the Supreme Court of *New York*, in the case of *Post, &c. v. Neafie*, 3 *Caines*, 22. That was an action on a decree in chancery in *New Jersey*, for the payment of a sum of money, and a majority of the court sustained the action. By the law of *New Jersey*, a decree in equity has the effect of a judgment in the Supreme Court of law. Whether the state of *Tennessee* has a law of that kind, I know not; but it appears that an execution may issue there, on a decree in equity, as on a judgment at law. The Supreme Court of *New York* however, did not decide upon the particular circumstances which I have mentioned in the law of *New Jersey*, but upon broader and more general principles. It has been objected, that courts of law are not bound to give effect to decrees founded upon principles of equity. But why not? Granting that the demand did originate in principles of equity, yet after a fair hearing, and full consideration, it was decided that the plaintiff was entitled to a certain sum of money, to be paid by the defendant; what reason is there which should restrain a court of law from sustaining an action for the sum thus reduced to a certainty? It was also objected, that a decree in chancery, may be opened, altered, or annulled, on a bill of review. True it may; and so may a judgment at law be reversed on a writ of error. But still, an action of debt lies on the judgment, as long as it is in force. Should it be afterwards reversed, the injured party would not be without remedy, and the same would be the case should a decree in chancery be reversed. No case has been shown, where it has been decided on broad principles, that an action at law would not lie for a sum of money decreed to be paid by the court of equity, and one case, (*Post, &c. v. Neafie*,) has been shown to the contrary. In *Pennsylvania*, the courts should be extremely cautious in establishing that principle, because it would be shutting their doors against all relief in cases where money has been decreed to be paid by courts of equity in other states. Very urgent cases may arise, where crying injustice would be done, if relief were denied, and, we ought not to rely on the equity courts of the *United States*, which may be established in *Pennsylvania*. Our own system of jurisprudence should be complete. In considering this question, we should throw out of view, any redress which may be accidentally obtained, in courts over which the legislature of this state has no controul. Upon the whole, I am of opinion, that the action should be sustained, and this judgment of the District Court affirmed.

Judgment affirmed.

[PHILADELPHIA, MARCH 31, 1823.]

In the case of the Estate of MARTIN SHAEFFER, deceased.

IN ERROR.

The debtor is not exempted from the payment of interest by the continued absence of the creditor at a distance from the state, and his not being heard of for many years. Therefore, where bonds were given in *Northampton* County for a portion of a distributive share, and the obligee was then absent, and the last that was heard of him afterwards was, that he was at *Natchez* in 1806, and administration was taken out of his estate in 1818, on the presumption of his death; it was held, that the obligor was bound to pay interest on the bond.

THIS was an appeal by *John Schaeffer*, from the decree of the Orphans' Court of *Northampton* County.

In settling the administration accounts of *John Schaeffer*, the appellant, the Register of *Northampton* County, charged him with two sums, one of £296 12s. 6d., the other of £153 16s. under the following circumstances:

Henry Schaeffer, the elder, father of *Martin*, of *John*, and of *Henry Schaeffer*, the younger, died some time prior to the 12th of *August*, 1801, leaving real estate. Proceedings by petition were instituted in the Orphans' Court, the real estate valued, and accepted at the valuation by *Henry Schaeffer* the younger. *Henry* gave bonds to the other children for their respective shares, and among them, a bond in favour of *Martin Schaeffer*, for £429 18s. 9d., payable in two instalments, one on the 12th of *August*, 1802, of £286 12s. 6d., the other £143 6s. 3d. to be paid at and immediately after the decease of *Elizabeth Schaeffer*, widow of *Henry Schaeffer* the elder.

This bond was deposited in the office of the clerk of the Orphans' Court. *Elizabeth Schaeffer* died on the 24th *December*, 1801. On the 13th *May*, 1807, *John Schaeffer*, and *Henry* the younger, negotiated an exchange of properties. And as part of the consideration, *John* agreed to pay the monies due on the bond to *Martin* by *Henry*, on the 27th *May*, 1807.

Martin left *Northampton* in the year 1793. The last intelligence had of him by any of the family was in 1806, by letters from *Natchez*. It was presumed that he had died, and *John Schaeffer* administered to his estate on or about the 26th *August*, 1818. On the 12th *November*, 1819, he filed an account in the Register's office, and charged himself with the principal sums due *Martin* from *Henry*, viz: £286 12s. 6d., and £143 6s. 3d. The Register added a charge of interest upon the first instalment up to the said 12th *November*, amounting to £296 12s. 6d., and upon the second instalment from the death of *Elizabeth Schaeffer*, to the same time £153 16s.

The Orphans' Court upon petition, referred the account to auditors, who reported it exactly as stated, in relation to the charge of

(In the case of the Estate of Martin Schaeffer, deceased.)

interest, by the Register. And, upon argument, the court confirmed this report, with some trifling alterations in other points.

The appellant now excepted to the charge of interest.

Scott, for the appellant, contended, that as *Martin Schaeffer* was absent from the country when the bond to him was payable, and continued absent until his presumed death, and for the greater part of the time he was not heard of by the family, nor was it known whether he was alive or dead, the appellant was not bound to pay interest on the bond. It is a principle of law, that where payment of the principal is prevented by law, or by the act of the party, interest shall not run. Here *John Schaeffer* had no opportunity to pay the principal, but was prevented by the voluntary act of his creditor, in withdrawing beyond his reach. Interest is not a part of the debt, but something added by way of damage for the detention. Thus all interest on *British* debts was suspended during the war, because the debtor could not remit the principal. *Houn v. Allen*, 2 *Dall.* 102, and note. Where payment of the principal is prevented by law, interest is suspended, *Conn v. Penn's lessee*, 1 *Pet.* 524. When money is arrested in the hands of a garnishee, he is, for the same reason, exempted from interest. The debtor is in the present case prevented by the creditor himself, from the possibility of making a tender, by which he might relieve himself from paying interest, and, therefore, stands in the same situation as if a tender had been made, and refused. If the mortgagee be out of the realm of *England*, the mortgagor is not bound to seek him, or go out of the realm for him; and as the mortgagee is the cause that the mortgagor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition. *Co. Lit.* 210, *b.* In *Jacobs v. Adam*, 1 *Dall.* 52, a payment was made to executors, named in a will, which was afterwards set aside: it was held, that the person who had paid, should recover back the principal, but without interest. There is no case to be found in which it has been held, that the debtor is bound to pay interest, under circumstances like the present.

The court would not hear *Condy* for the appellee.

The opinion of the court was delivered by

DUNCAN, J. *John Schaeffer*, the administrator of *Martin Schaeffer*, deceased, appealed from the decree of the Orphans' Court of *Northampton* County, charging him with interest on certain debts under the following circumstances:

Henry Schaeffer, the elder, father of *Martin*, of *John*, and of *Henry Schaeffer*, the younger, died some time before the 12th of *August*, 1805, intestate, leaving real estate. Proceedings were had in the Orphans' Court, the estate was valued, and accepted at the valuation by *Henry*, who gave bonds to the children for their respective shares, and among them a bond to *Martin*, for £429 18s. 9d., payable in two instalments, one on 12th *August*; 1802, for

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£286 12s. 6d., the other for £143 6s. 3d., to be paid on the widow's death. *Martin*, being absent, the bond was deposited in the office of the clerk of the Orphans' Court. The widow died on the 24th *December*, 1801. On the 18th *May*, 1807, *John* and *Henry* made an exchange of lands. Sufficient appears to show, that *Henry* gave in exchange the land taken at the valuation by him, and as part of the consideration, *John* agreed to pay this bond, with interest, to become due after 27th *May*, 1807, and to indemnify *Henry*. The interest due on the bond up to the time of exchange, was calculated and allowed to *John*, as a part of the consideration money, to be paid to *Henry*. *Martin* left *Northampton* in 1793, and no account was received of him until 1806, when his friends received letters from him dated at *Natchez*. *Natchez* had then been ceded to the *United States*, possession taken, and was under the government and jurisdiction of the *United States*. No further account was received from him; where he lived or died was unknown, but it was presumed he was dead; and in *August*, 1818, *John* administered, and on the 12th *November*, 1819, he filed an administration account in the Register's office, and charged himself with the principal, and the Register added a charge of interest on the instalments, on the first £296 12s. 6d., and on the second from the death of the widow. The Orphans' Court confirmed the account as settled by the Register, and from this decree, *John* has taken this appeal, alleging, that inasmuch as it was not known where *Martin* was to be found, or whether he was alive or dead; he was not bound to make a tender to him, nor could he do so, and that he stands precisely as if he had made the tender; and *Martin* had refused; in short, as if this was an action on the bond, with a plea of tender, *tout temps prist*, and the money brought into court. If *John* is absolved from the payment of interest, he must show some strict rule of law, which produces this consequence, for our sense of justice revolts at it, and we should regret to find any principle of law which would screen him from paying this just debt; for the interest due on this bond, is as much due *ex debito justitiæ*, as the principal is.

A condition, on the non-performance of which a forfeiture is to be incurred, or on the performance of which, an estate is to be raised or re-vested, is a very different matter from a condition to pay money, which works no injury, but is barely a compensation for the use of the money. As to the forfeiture of double the sum, that is now merely nominal. And even in the first cases, if the obligee is out of the realm, the obligor is not bound to go out of the realm unto him, and because the feoffee is the cause, that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it, according to the condition. *Co. Litt.* 210. And here there is no evidence that ever *Martin* remained out of the *United States*. The only account we have of him, is in the jurisdiction of the *United States*. If this would excuse a tender,

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then *John* ought to have clearly proved the fact. But where money is secured by bond, payment is at the peril of the obligor, and it is no great burden on him to pay interest. I say nothing of legal impediments, but speak of the absence of the obligee. Now the absent creditor, I mean absent beyond sea, is a privileged creditor. The act of limitations does not run against him, until he come within the *United States*; if he is within the *United States* after the debt becomes payable, it then first runs, and continues to run, notwithstanding subsequent absence beyond sea. It would seem equally reasonable, that his interest should be as much protected by his absence, as the principal. When *Martin* died we have no account of. From his silence after 1806, the presumption is, that he died about that time; and *John*, with full knowledge that in 1806, he was alive at *Natchez*, promises for a full consideration, to pay the debt, with the interest that should accrue in 1807. If he then died, even limitation, if the bond was within the limitation law, would not effect this claim, until administration was taken out; for if A. receive money belonging to a person, who afterwards dies intestate, and to whom B. takes out administration, and brings an action against A., who pleads the statute of limitations, and plaintiff replies, showing administration not committed to him within 6 years, though 6 years have expired since the receipt of the money, yet not being so since the administration committed, the action is not barred by the statute. *Curry v. Stevenson, Salk.* 421. If the principle be true, that absence is an answer to a demand of interest, because there is no one to whom the principal can be tendered, then this consequence would follow, as death would more effectually preclude a tender, interest could never be recoverable *mesne* between the death of the creditor and taking out letters of administration. This is very certain, that *John* has not discovered much anxiety to find him out, and to inform him that his money was ready for him.

Whenever the law prohibits the payment of the principal, interest during the existence of the prohibition, is not demandable, *Hoare v. Allen, 2 Dall.* 102. Even a state of war existing between the two nations, is not a sufficient reason for abating interest, on debts due by the subjects of one belligerent to another, *Conn & Al. v. Penn, Peters Rep.* 524, unless all intercourse is forbidden by law. But here is an express promise by *John* to pay *Martin* this interest, and where the principal belonged to infants in *Ireland*, and the obligor resided here, and there was proof of an express promise by the obligor to pay all the interest, it was held to be recoverable. *Exors. of Mease v. Rhodes, cited 2 Dall.* 132, 133.

There is but one case in which *uncore prist*, without tender, has been deemed a good plea, and that is, in case of a legacy, or bond given for the performance of a will. 1 *Lev.* 87. *Slannings Case, Poph.* 102. *Thomson & Wife v. The Exors. of Young Blood, 1 Bay,* 249, and *Knapp. v. Powell, Pr. Ch.* 11.

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It is the duty of a legatee to demand his legacy, to make himself known to the executor, as there is no privity between them. Yet even in that case, it would seem, that he should make out what his plea states, that he has been always ready, and the money by him. For if he has used the money, he ought to pay interest. There is, however, no strict obligation on the executor to scent out the legatee, and make a tender to him, as there is in the case of an original debtor, who must pay at his peril. But if the fund on which the legacy is charged produces an interest, then the legatee is entitled to interest. In *Slanning's Case*, there is another principle stated, which is, that if the obligee fraudulently keeps out of the way of the obligor, to avoid a tender, this would be equivalent to a tender. This seems reasonable. But it is a state of things not likely to occur again in this country. It once did, when continental money was a legal tender. Then the debtor followed his flying creditor, hunted him down with as little mercy as the creditor after the return of peace, pursued the debtor. It has been said, that there is no express decision to be found in the books. I think there is; but if there were not, it is because the objection to payment of interest was never considered as tenable; the right has never been questioned. It is not from decided cases alone, that we are to take the law. Long continued usage without objection, makes the law, though the point has never been raised in argument.

The correspondence between *Mr. Jefferson* and *Mr. Hammond*, subjoined to the case of *Hoare v. Allen*, and *Conn. v. Penn's Lessee*, and the authorities referred to, establish, that the absence beyond sea of a creditor, is no impediment to the recovery of interest. In the very able letter of *Mr. Jefferson*, the subject is fully considered, and the exemption from interest on the ground of absence, never claimed. Indeed, had this been considered as the law, the long protracted controversy about payment of interest on *British* debts during the revolutionary war, would have been a very idle one. In all the contested cases in courts of justice, the exemption was claimed on account of the war, and prohibition of intercourse with the belligerent nation. I transiently glance at the consideration of the question of interest during a war, and prohibition of intercourse. The case does not call for any opinion on it. The decision of Judge WASHINGTON, in *Conn v. Penn's Lessee*, is of high authority. But this long and anxiously contested question of interest during the revolutionary war on *British* debts, as well as the correspondence I have referred, prove with a degree of force, equal to any accumulation of precedents, that interest is not suspended during the absence of the creditor beyond sea. Law may exist, and may not be found in the books: for that may be law which, in point of principle, is so clear, that it never occurred to any man to question it, till a case came to draw it into doubt.

Justice requires that *John* should at least be not more favoured

(In the case of the Estate of Martin Schaeffer, deceased.)

than *Henry* would be in a suit brought on the bond. He has prevented that in some measure, by taking out administration himself, and thus becoming in fact both debtor and creditor. In law *Henry* would not be discharged from interest. Let us see what are *John's* equitable pretences. In equity, it is precisely as if *Henry* had paid him the money. It was payment. Retainer is payment. As a trustee, voluntarily undertaking the office, he would be responsible for interest. He used the money, and if he did not use it, he should prove the fact, that it was always lying by him.

A purchaser discovering an incumbrance, may retain; and if he does, enjoying the profits of the land, he must pay interest.

It is not always true, that if a man cannot be called on for the principal, he is not chargeable with interest. For where vendee goes into possession before conveyance, though the principal cannot be demanded until conveyance tendered, he is chargeable with interest. So where the vendor suffers the money to remain in the hands of the vendee, for the purpose of discharging incumbrances on the land, the vendee must allow interest. That was this very case.

The amount of this incumbrance, by the acceptance by *Henry* of the father's land at a valuation, was left in *John's* hands, who bought the land, for the purpose of discharging this bond. In every view of the subject, legally or equitably considered, the decree of confirmation by the Orphans' Court was right.

Proceedings confirmed, and record remitted to the Orphans' Court for execution.

Proceedings confirmed.

[PHILADELPHIA, MARCH, 31, 1823.]

JOURDAN *against* JOURDAN.

IN ERROR.

The deed of a feme covert is void, if it do not appear from the certificate of her acknowledgment, that she was examined separately and apart from her husband. Stating that she voluntarily consented thereto, will not cure the defect. Nor is the parol evidence of the magistrate admissible, to show a separate examination.

In *Pennsylvania*, a collateral warranty descends on the eldest son.

Where the deed executed by a married woman is void, parol evidence is admissible to show, that after her husband's death she delivered and ratified it.

Circumstances may be proved, from which the jury may infer such delivery.

Evidence of circumstances to show a family arrangement at the execution of deeds, is admissible: and a deed otherwise invalid, would be good evidence if it formed a component part of such arrangement.

ERROR to the Court of Common Pleas of *Chester* county, in an ejectment brought by *John Jourdan*, the plaintiff below, against *Hugh Jourdan*, the defendant below, and plaintiff in error, tried before HALLOWELL, President, who, with the associate Justices of *Chester* county, held a special court for the trial of causes in

(Jourdan v. Jourdan.)

which DARLINGTON, President, had been of counsel. In the court below, a verdict and judgment were had for the plaintiff, and several exceptions on points of evidence, were taken by the defendant,

The bill of exceptions stated, that the plaintiff gave in evidence deeds and other testimony showing, that *Hugh Stewart* was seised in fee of the premises claimed in the declaration, and died intestate, leaving one daughter, *Sarah*, his only child, who intermarried with *John Jourdan*, the father of the plaintiff and defendant: and that she had in all five children, viz. *Hugh*, the defendant, the eldest son, *John*, the plaintiff, *Stewart*, *Ann*, wife of *James Steen*, and *Lilly*, wife of *Joseph Filson*. *John*, the father, died intestate, leaving *Sarah*, his wife surviving, and *Sarah* died after the year 1794, intestate, leaving the above named child surviving her. The defendant gave in evidence the following deeds, viz: one dated *September 29th*, 1807, from *John Jourdan*, the plaintiff, to *Sarah*, his mother, *Hugh*, *James Steen*, and *Ann* his wife, *Joseph Filson*, and *Lilly* his wife, and *Stewart Jourdan*. One other, of the same date, from *Sarah*, *Hugh* and his wife, *Joseph Filson* and *Lilly* his wife, *James Steen* and *Ann* his wife to *John*, the plaintiff. One other, dated the 13th *April*, 1810, from *Sarah*, *Hugh*, and *Joseph Filson*, and *Lilly* his wife, to *James Steen*.

And the defendant then offered in evidence:

1. The testimony of *Robert Miller*, Esq. a justice of the peace, before whom the said deeds of the 29th *September*, 1807, were executed, to prove, that at the time of executing the said deeds, a certain other deed from *John Jourdan*, the father, and *Sarah* his wife, to the defendant *Hugh*, dated the 31st *December*, 1802, conveying the premises in question, was read in the presence of *John*, the plaintiff. This testimony was objected to by the plaintiff, and overruled by the court.

2. The above mentioned deed, dated the 31st *December*, 1802, from *John Jourdan*, father of the plaintiff and defendant, and *Sarah* his wife, to the defendant, for the land in dispute, which was duly executed by them, and acknowledged before *James M. Gibbons*, a justice of the peace of *Chester* county: but though the certificate of the magistrate stated, that the wife voluntarily consented, it did not state that she was examined separate and apart from her husband. The deed was, on that account, objected to by the plaintiff, and overruled by the court.

3. The defendant offered to prove by *James M. Gibbons*, Esq. that the said *Sarah* was by him examined separately and apart from her husband, and on the examination, the contents of the deed were by him made known to her, and she declared that she voluntarily, and without coercion consented thereto, and that the insertion of these facts was omitted by accident and mistake. But this testimony being objected to by the plaintiff, the court rejected it.

(Jourdan v. Jourdan.)

4. The defendant further offered the said deed of *December 31, 1802*, as the deed of *John Jourdan*, the father, and containing a warranty against his heirs claiming either under him or their mother *Sarah*, accompanied with an offer to prove, that lands descended in fee simple from the said *John*, the father, to the plaintiff, more than equal in value to the premises claimed in this ejectment. The plaintiff also objected to this evidence, and the court overruled it.

5. The defendant offered to prove, that *Sarah*, the mother, after the death of *John*, the father, namely, in *April, 1810*, at the time when she joined with *Hugh*, the defendant, and *Joseph Fiston*, and *Lilly* his wife, in the execution of the release to *James Steen*, of the same date, delivered and ratified the deed of *December 31st, 1802*, from her husband and herself to the defendant: that the said deed was distinctly read over to her, and she expressed herself satisfied with it, and gave it her consent, and it was again delivered to the defendant, and after this she permitted the defendant to erect a barn and other improvements on the land conveyed by it, at his own expense, and that she called it his land, and that after her death he was to have the land, according to the provisions of the deed. This evidence was also objected to, and overruled by the court.

6. The defendant further offered parol evidence, and the following documents and papers, to prove a family arrangement by and among the children of the said *John* and *Sarah*, under which the defendant was to have the premises in dispute, as his share and purport of his father and mother's estate. 1. A letter of attorney, dated 1st *December, 1804*, from *John*, the father, to the defendant and *James Steen*, who had married one of the daughters. 2. The record of an action in the court of Common Pleas of *Chester* county, in which the plaintiff in this ejectment was plaintiff, and the defendant and *James Steen* were defendants, including the papers furnished to the defendants therein by the plaintiff, in compliance with the oyer craved in the said suit. 3. An article of agreement between the defendant and *James Steen*, attorneys in fact of *John* the father, dated *May 12th, 1807*. This evidence was objected to by the plaintiff, and overruled by the court.

Condy, for the plaintiff in error, considered the following questions:

1. Does collateral warranty with assets bar?
2. What is the effect of the acknowledgment by *Sarah Jourdan*?
3. If it was insufficient on its face, could the defect be supplied by the parol evidence offered?
4. Was not evidence admissible, that the feme ratified the deed, after she ceased to be covert?
5. Whether the evidence was admissible, to prove a family arrangement, under which each child was to have a portion?

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1. This warranty was a collateral warranty, because the land being owned by the mother, it was impossible that the defendant, the grantee, could inherit it from the father who made the warranty. At common law, such warranty barred the heir on whom it descended, without any assets, except where the warranty commenced by disseisin. *Lit. sec. 697. 7 Bac. Ab. 235. Tit. Warranty, I.* A warranty by a tenant by the curtesy was a bar to the heir without assets. *Lit. Sec. 724, 725.* But the stat. of *Gloucester*, 6 E. 1 C. 3, has made considerable alteration in the doctrine, and by that statute, a warranty by a tenant by the curtesy is no bar to the heir, without assets in fee simple: *Co. Lit. 379, 380.* But if a husband convey the estate of his wife with warranty, and leave assets, this bars the heir notwithstanding the statute of *Gloucester*. *Littleton, Sec. 728*, says, that "by force of the same statute, if the husband of the wife alien the heritage or marriage of his wife in fee, with warranty, &c. by his deed in the cuntry, it is clear law, that this warranty shall not bar his heir, unless he hath assets by descent;" and Lord *Coke* 366, *a.* "if the husband be seised of lands in right of his wife, and maketh a feoffment in fee with warranty, the wife dieth and the husband dieth, this shall not bind the heir of the wife without assets." By the statute of 4 and 5 *Ann. c. 16*, all collateral warranties to be made after a certain date, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, are void against his heir. But though the statute of *Gloucester* extended to *Pennsylvania*, *Report of the Judges of the Supreme Court*, 3 *Binn.* 602, yet the statute of *Ann* does not: and it has been decided by this court, that a collateral warranty by tenant by the curtesy with assets is a bar to the heir. *Eshelman v. Hoke*, 4 *Dall.* 168. 4 *Yeates*, 509, *S. C.* The principle on which a collateral warranty bars, is the same as that adopted by equity, that one shall not claim under a will, and at the same time defeat it in part.

2. Though the acknowledgment does not pursue the words of the act of assembly, in stating that the wife was separately examined, yet sufficient appears to show that such was the case. The acknowledgment states, that she voluntarily consented, which implies that the husband was not present: for if he were present, she could have no will. It has been held, that no particular form of words is necessary to make the acknowledgment good: the words of the act need not be used if its directions are substantially complied with. *M'Intire's lessee v. Ward*, 5 *Binn.* 301. This inference is strengthened by the presumption of the law, that the magistrate, in his official acts, fulfilled his duty, where nothing appears to the contrary. *Shaller v. Brand*, 6 *Binn.* 447.

3. Evidence ought to have been admitted to show, that the omission of the magistrate was by accident, or mistake, and that the wife was separately examined in conformity to the act. The act of assembly does not declare at what time the magistrate shall make

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his certificate: and if he might make a second certificate according to the truth, he might state the same thing on oath. In *Pennsylvania*, it is a settled rule, that parol evidence may be given of what passes in the presence of the parties immediately before or at the execution of a deed, to show a mistake, and there is no reason why the same principle may not be applied to an acknowledgement.

4. The court below was manifestly wrong in rejecting the circumstances offered to show a subsequent confirmation by *Sarah Jourdan*, after the death of her husband. The evidence offered was strong to this point, and would probably have satisfied the jury of her confirmation and redelivery of the deed. In *Goodright v. Strahan*, *Coup.* 201, it was decided, that redelivery by the feme, after the death of the husband, of a deed delivered by her whilst covert, is a sufficient confirmation of such deed, so as to bind her, without its being re-executed or re-attested: and that circumstances alone may be equivalent to such redelivery, though the deed be a joint deed by baron and feme affecting the wife's land, and no fine levied.

6. As the evidence of the family arrangement. *Sarah Jourdan*, was the daughter of *Hugh Stewart*, and it was his desire that his grandson *Hugh*, the eldest son of his daughter *Sarah*, should have the land which his daughter received from him. In the power of attorney of the 1st *December*, 1804, *John Jourdan*, the father to *Hugh*, it is said, that *Hugh* was not entitled to any portion of his father's estate, because, as we contend, it had been agreed among the family that *Hugh* should have his mother's estate, and no part of his father's estate. These and other circumstances ought to have been permitted to go to the jury, to show an equitable title in us, which was good against the plaintiff, and all who were parties to the agreement.

Tilghman, contra, contended:

1. That in the present case, the collateral warranty was no bar, because a warranty descends on the heir at common law. 7 *Bac. ab.* 229. 1 *Inst.* 12: and in the present case *Hugh*, the defendant, being the eldest son, was the heir at common law, and on him it descended. Thus the text of *Littleton* is express, that where lands are descendible by the custom of borough English, to the youngest son, or are gavelkind, and go to all the brothers, the warranty by the ancestors, descends only to the eldest brother, who is the heir at common law, and the others shall not be barred though they are heirs to his lands and tenements. *Lit. Sec.* 735, 736. In *Pennsylvania*, though the lands of the intestate descend to the children equally, yet, the warranty descends only to the heir at common law, namely, the eldest son.

2. On the second point the court stopped the counsel from arguing.

3. The requisites of the act of assembly must appear in the certificate itself, and cannot be supplied by parol proof. In *Walton's*

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lessee v. Bailey, 1 Binn. 470, an attempt was made to supply the defect of the certificate by parol proof, but the court determined, that it ought not to be received. The principle of this case was recognized in *Commonwealth v. Jones*, 3 Serg. & Rawle, 158, in which it was held, that parol proof is not admissible to show the assent of the parties to the assignment of an indenture of apprenticeship, but it must officially appear in the certificate of the magistrate.

4. No offer was made to prove redelivery of the deed by the widow, except from circumstances: and whether these should go to the jury, was for the court to decide, on a view of them all.

5. There was nothing in any of the papers which went to show a family arrangement.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an ejectment for a tract of land in Chester County, brought by *John Jourdan*, the defendant in error, who was plaintiff below, against *Hugh Jourdan*. On the trial in the Court of Common Pleas, the defendant offered sundry matters, both written and parol, in evidence, which were rejected by the court, whereupon the counsel for the defendant excepted to their opinion.

1st. The first evidence rejected, was a deed from *John Jourdan, Senr.*, and *Sarah* his wife, to their son *Hugh Jourdan*, the defendant, for the land in dispute, which was the estate of the said *Sarah*. This deed was acknowledged by both the grantors, before *James M. Gibbons*, a Justice of the Peace of Chester County, as appeared by his certificate; but it did not appear that the wife was examined separate, and apart from her husband, and that was the reason of its rejection.

As to the acknowledgment of deeds by married women, the principle now firmly established is, that the requisites of the act of assembly, by which the mode of conveyance by *femes covert* is prescribed, must appear to have been substantially complied with, on the face of the certificate, made by the magistrate by whom the acknowledgment was taken. *Watson's Lee v. Bailey*, is the leading case, 1 Bin. 470; since which have been the cases of *M'Intire v. Ward*, 5 Bin. 296, *Shaller v. Brand*, 6 Bin. 435, *Evans v. The Commonwealth*, 4 S. & R. 272, *Watson v. Moreen*, 6 S. & R. 49, and *Hopkins v. Birchall*, 6 S. & R. 143. And in conformity with this principle, the counsel for the defendant has contended, that it substantially appears, the wife was examined separate and apart from her husband, because it is certified by the magistrate, that she *voluntarily consented*, which she could not do, if her husband were present; because, then, it would be presumed, that she was under coercion. This argument is too refined. A separate examination is essential, and ought sufficiently to appear. In the present instance, the magistrate certifies, that the *feme vo-*

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luntarily consented. We are to understand by that, that being asked by the magistrate, whether she made her acknowledgment of her own free will, without any coercion or compulsion of her husband, she answered in the affirmative. Nothing more can be fairly implied. Whether this examination was in the presence of the husband, or not, does not appear, nor is there any ground for inference on that point. It might in truth be, that she freely consented, though her husband was present. But that will not satisfy the law. Examine the woman how you will, it is impossible to ascertain with certainty, whether she gives her free consent; her word must be taken for that. She may in fact, be under terror, though she be examined in the absence of her husband. But there is a better chance for her speaking her real sentiments, in his absence than in his presence. And it is difficult for the law to protect her further, than by giving her an opportunity of disclosing her mind to the magistrate, out of the presence of her husband. The act, therefore, directs this examination of the wife to be separate and apart from the husband; and in this the magistrate has no discretion. He has no right to say, that the consent was voluntary, unless the husband and wife were separate, and that they were separate must appear on the face of the certificate, and not otherwise. I am, therefore, of opinion, that the certificate of acknowledgment was defective. But it was attempted to supply this defect, by the parol evidence of the magistrate, before whom the acknowledgment was made. This evidence was also rejected, and in my opinion, with great propriety. That point was expressly decided in the case of *Watson's Lessee v. Bailey*, 1 Bin. 470. In that case, the certificate of the magistrate was defective, and in order to supply the defect, parol evidence was offered, and refused by the court. There would be no certainty in titles, if this kind of evidence were permitted. The deed in question, was acknowledged 31st December, 1802; and after the lapse of twenty years, the magistrate is called upon to declare what took place at the time of the acknowledgment. If it were a new point, I should say, that the evidence ought not to be admitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else. But the point is not new. The decision in *Watson & Bailey*, has been recognized in other cases. There can be no hesitation, therefore, in saying; that in the present instance, the parol evidence was inadmissible. But there was another point of view under which the same deed was again offered as evidence. It contains a warranty, by *John Jourdan* the father, against himself and his own, and his wife's heirs, and the defendant offered to prove, that other lands descended in fee simple from the said *John Jourdan* the father, to his son *John*, the plaintiff, more than equal in value, to the premises claimed in this suit. This was a collateral warranty, because the land being the estate of the wife of the warrantor, it was impossible that his child could in-

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herit it from him. A collateral warranty, with assets, is a bar to the heir of the warrantor—but there is a decisive objection to a bar in this case. The warranty of *John Jourdan* the father, did not descend upon his son *John*, the plaintiff, but upon *Hugh*, the defendant, who was the eldest son and heir at common law. Our act of assembly directing the descent of the real estates of intestates, makes no mention of warranties, and in no manner directs the mode of their descent. That act operates only on such estates as the intestate had power to dispose of. It has no effect on estates *tail*, nor on estates held in trust by the intestate. Such has been the uniform and settled construction. The descent of warranties then, is left to the common law, and the authorities are express, that a warranty can descend on no other than the heir at common law; although the land of the warrantor may descend to all the sons equally, as is the case with lands held in *Gavelkind*, or to the youngest son only, where the lands are held in *Borough English*. In 1 *Inst.* 12, it is said by Lord Coke, “that a warranty shall not go with tenements to which it is annexed, to any special heir; but always to the heir at common law.” And in *Littleton Sect.* 735, the case is put, of tenant in tail, seized of tenements in *Borough English*, who discontinues the tail with warranty, and has issue, two sons, and dies seised of other tenements, in the same Borough, in fee simple, to the value, or more, of the lands entailed; yet the younger son shall not be bound by the warranty of his father, although assets descended to him in fee simple from his father, according to the custom, because the warranty descended on the elder brother, and not upon the younger. Then *Littleton* adds, “and in the same manner it is of collateral warranty made of such tenements; where the warranty descends upon the eldest son, it shall not bar the youngest son.” In *Litt. Sect.* 736, it is said, that in case of *Gavelkind* lands, which are dividable between all the sons, the warranty of the father descends upon the eldest son only. As to the case of *Eshelman v. Hoke*, decided by this court, and reported in 2 *Yeates*, 509, it is to be remarked, that the only point to which the attention of the court was drawn, was whether the statute of 4 & 5 *Ann. Ch.* 16, by which all collateral warranties are void, unless made by one who is seised of an estate of inheritance in possession, had been extended to *Pennsylvania*. The court held, that it had not been extended, and therefore, a collateral warranty with assets was a bar, though the warranty was not made by a person who was seised of an estate of inheritance. Had the question been presented to the court, whether a warranty can descend on any other than the heir at the common law, I presume there can be no doubt, that it would have been answered in the negative.

As it is now settled, that the statute of *Ann.* does not extend to this state, possibly the legislature may think it prudent to make some provision, whereby all injustice and inconvenience, from the effect of warranties, whether lineal or collateral, may be prevented. The subject certainly deserves consideration. For although the

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warrantee and his heirs and assigns, may have remedy by action on the covenant of warranty, in cases where the land is recovered from him by one of the children of the warrantor, yet the remedy is uncertain (by way of damages,) and may be inadequate. The law of warranty has fallen very much into disuse, and consequently the knowledge of it is difficult. The remedy by voucher is unknown; (except in common recoveries,) because our actions for recovery of land have been confined almost exclusively to ejectment, in which voucher does not lie. As for the writ of *warrantia chart*, I do not know that it has ever been resorted to. And the situation of the warrantee is embarrassed by our law of descent, which divides the real estate of the warrantor among all his children, while the warranty is left to descend at the common law, on the eldest son only. In such a situation it is very desirable that the whole law of warranty should be simplified, and adopted to common understanding, and to our present mode of conveyancing, which is altogether different from that which prevailed when warranties were first introduced.

The next question which arose on the trial of this cause was, on parol evidence. The defendant offered to prove, that the plaintiff's mother, under whom he claims, after the death of her husband, *John Jourdan*, delivered and ratified the deed of 31st December, 1802, which had been executed by her and her husband, but had no effect as to her, because not acknowledged according to law. This evidence the court rejected, and their opinion may be accounted for, by the hurry of a jury trial, in which many points were to be decided in a short time. Certain it is, however, that the evidence ought to have been admitted. The first execution of the deed by *Mrs. Jourdan*, was a nullity, because the terms of the act of assembly had not been complied with; by the magistrate who took her acknowledgment. There was no objection, therefore, to her delivering the deed, after the death of her husband, and such delivery might be well proved by parol evidence. There was error, therefore, in the rejection of that evidence. But besides this, the defendant offered to prove a variety of circumstances, from which it might be inferred, (in case the direct proof should fall short,) that *Mrs. Jourdan* had delivered this deed, after the death of her husband. This evidence was also rejected, and in my opinion improperly: It was decided in *Carter's lessee v. Straphan*, Cowp. 201, that the deed of a married woman was void, but might be made good by delivery only after the death of her husband; also, that delivery might be presumed, from circumstances. Undoubtedly the circumstances should be very strong, from which a delivery should be presumed; but it was proper that they should be heard.

Last of all, the defendant offered in evidence, a variety of other matters mentioned in the bill of exceptions, from which it might appear, that in the life of *John Jourdan*, the father, and his wife, and about the time of their executing the deed for the lands in dispute, to *Hugh Jourdan* the defendant; a family arrangement had

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been made, to which the father, mother, and all the children were parties, by which it was agreed, that the land of the mother should go, after her death, and her husband's, to the defendant; and the land of the father to the other children; and that in consequence of this agreement, the defendant had been precluded from any share of his father's estate. This evidence was rejected, but I think it should have been received. It is unnecessary, and indeed, would be improper, to give an opinion at present, on the equity of the defendant's case. Suffice it to say, that the case appears to be a hard one, if he loses his mother's land, and he ought to have been permitted to show all the circumstances of the family agreement, which he undertook to prove. We may easily conceive, that a case might possibly have been made out, in which the equity would have been irresistible. He may have released to the other members of the family, all his right to his father's land, *on the faith of their consent to his enjoying the land of his mother*. All, however, that need be said at present, is, that his evidence should have been heard; and in that stage of the cause, I am of opinion, that the deed from *Jourdan*, the father, and his wife, to the defendant, might have been evidence, as a component part of the family agreement; though not as a conveyance passing the estate of the wife.

I am of opinion, upon the whole, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire de novo* awarded.

[PHILADELPHIA, MARCH 31, 1823.]

PEDDLE *against* HOLLINSHEAD.

COZENS *against* HOLLINSHEAD.

If the sheriff return to a *levari facias* struck off for a certain sum, and sheriff could not make a title, therefore remains unsold, the plaintiff may issue a new execution.

The privilege of a stay of execution under the appraisement act of 28th March, 1820, expired with that act, and existed afterwards, in relation to executions issued while that act was in force, only as modified by the act of the 27th March, 1821.

If the legislature gives an indulgence of a stay of execution to a debtor, it may afterwards modify or withdraw it.

An omission in a *levari facias* of the command to levy the debt, is a clerical mistake, and may be amended after error brought, by the court above.

THESE were writs of error to the District Court for the city and county of *Philadelphia*, to remove the judgments and proceedings in two suits, in which *Hollinshead*, the defendant in error, was plaintiff, and the plaintiffs in error, respectively, were defendants.

The first of these suits was a *scire facias* upon a mortgage, brought by *Edmund J. Hollinshead*, assignee of *Joseph Ball*, for the use of *Jacob Ridgway* against *Joshua Peddle*, returnable to June Term, 1820. Judgment was entered for the plaintiff, for 2261 dol-

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lars, on the 19th *July*, 1820, upon which a *levari facias* was issued, returnable to *December Term*, 1820. On the 22d *September*, 1820, an inquisition was held under this writ, by which the premises were valued at 4500 dollars: and the writ was returned with the following indorsement: “*September*, 27th, 1820, struck off for 3000 dollars, and sheriff could not make title: therefore remains unsold. *Thomas Elliott*, Deputy Sheriff,” An alias *levari facias* was issued returnable to *December Term*, 1821, on which an inquisition was held, valuing the premises at 3000 dollars: and the writ was returned by the sheriff as follows: “Sold *October* 15th, 1821, to *Jacob Ridgway*, for 1050 dollars, which money the sheriff has ready, &c. *Caleb North*.”

The other case was a *scire facias* upon a mortgage, brought by *Edmund Hollinshead* against *Archibald J. Cozens*, and *Henry S. Cozens*, to *June Term*, 1820, in which the same questions were involved, though the circumstances were somewhat different. Judgment was entered for the plaintiff on the 3d *October*, 1820, for 3438 dollars, and a *levari facias* was issued to *December Term*, 1820. On the 7th *November*, 1820, an inquisition took place by which the premises were valued at 10,000 dollars: but the sale was staid by order of the plaintiff's attorney, and on motion and affidavit of plaintiff this inquisition was set aside. An alias *levari facias* was issued, returnable to *March Term*, 1821, and on the 30th *December*, 1820, another inquisition valued the premises at 7500 dollars. The return to this writ, dated *January* 15th, 1821, was “struck off for 6050 dollars, and sheriff could not make title, therefore remains unsold.” signed *Thomas Elliott*, for sheriff. A *pluries levari* issued to *December*, 1821, another inquisition was held on 26th *December*, 1821, valuing the premises at 6000 dollars. On which the sheriff returned, sold to *Jacob Ridgway* for 3600 dollars, *December* 26th, 1821.

Motions were made in the court below on behalf of the defendants respectively, to set aside the writs, the inquisitions, and the sales of the property to *Jacob Ridgway*, but were overruled by the court.

The following is an abstract of so much of the writ of *levari facias*, as is material, issued in the case of *Hollinshead v. Peddle*: and the same form was used *mutatis mutandis* in *Hollinshead v. Cozens*.

The commonwealth of *Pennsylvania* to the Sheriff of *Philadelphia* county greeting:

We command you, that without any other writ from us of the lands and tenements which were of *Joshua Peddle*, &c. to wit, &c. together with the hereditaments and appurtenances in your bailiwick, as well as a certain debt, &c. lawful money of the *United States*, with the lawful interest thereof, from the &c. as also, &c. for costs which said, &c. with the interest and costs aforesaid. *Edmund J. Hollinshead*, &c. lately in our District Court, for the

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city and county of *Philadelphia*, before our judges at *Philadel-
phia*, in the &c. by the consideration of the same court recovered
against the said premises above described, with the appurtenan-
ces to be levied by the default of the said *Joshua*, in not paying
the said sum of, &c. according to the form and effect of an act of
assembly of the commonwealth of *Pennsylvania*, in such case made
and provided.

And have you there moneys before our judges at *Philadelphia*,
at our District Court for the city and county of *Philadelphia*, on
the first Monday of *March* next, to render to the said *Edmund*
for the debt, interest, and costs, aforesaid.

And have you then and there this writ.

Witness, &c.

The following errors were assigned in *Peddle v. Hollinshead*:

1. That by the sheriff's return to the first *levari facias*, it ap-
pears that a sale of the premises levied was made, and that there-
fore, the premises did not "remain unsold."

2. That the premises levied on having been sold under the first
levari, the *alias levari* was irregular and void, and ought to have
been set aside by the court.

3. The *alias* was issued before the expiration of one year from
the return day of the first *levari*.

4. The sale alleged to have been made under the *alias*, was void,
the premises having been already sold by the sheriff.

5. The sale was also void, because it was for less than two-thirds
of the valuation or appraisement, under the *levari* returnable to
December, 1820.

6. That no writ commanding or empowering the sheriff to ex-
pose the premises to sale, ever issued in this case; the paper on
which he acted is erroneous in recital, defective in authority, unin-
telligible and absurd.

The same errors in substance were assigned in *Cozens v. Hollins-
head*, the only difference being that in *Cozens v. Hollinshead*,
the first *levari* and inquisition were set aside, and the subsequent
proceedings were on an *alias* and *pluries*.

Rawle, for the plaintiff in error.^a

1. 2. From the return of the sheriff to the *levari*, it appears
that a sale was made, and therefore the premises could not remain
unsold. The return of "struck off," is a return of a sale: the pur-
chaser was bound, and both the plaintiff and defendant had an
interest in the sale. The subsequent part of the return also shows
it. It is that "the sheriff could not make a title." It is not in
the sheriff's power to decide that it is no sale, and that there is no
title in the defendant. He ought not to be permitted to cast a shade
on the title. This return does not state that the purchaser refused

(a) The argument was applied to the case of *Peddle v. Hollinshead*, but the same
principles are involved in both cases.

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to take the premises, or objected to the title. Indeed, whether there was any title in the defendant or not, the purchaser at sheriff's sale is bound by his contract. *Smith v. Painter*, 5 Serg. & Rawle 223. If it was a return of sale the exigence of the first writ was completely complied with, and the *alias levare facias* and sale thereon were irregular and void, and the court below erred in refusing to set them aside.

3. and 4. By the act of assembly of the 28th March, 1820, sect. 1. 2, in case lands levied upon by a *levare facias*, cannot be sold at public vendue, for two-thirds or more of the appraisement made by the inquisition, the sheriff shall not make sale of the premises, but shall return the same, and all further proceedings, for the sale thereof shall be staid for one year from the return day of the *levare facias*. *Pamph. Laws*, 188. The execution was issued while this law was in force, returnable to December Term, 1820, an inquisition was held, and the property appraised at 4500 dollars. The property was offered for sale, and no sale, as is alleged, was completed. Under this act no further proceedings could be had till after December, 1821, one year from the return day of the *levare facias*, and, therefore, the *alias levare facias* was irregular. Besides, the property did not sell on the *alias* for two-thirds of the appraisement. But it is said, that the act of 1820 had expired, and that the second proviso of the act of the 27th March, 1821, qualifies the privilege of the defendant, and has not been complied with. It enacts, that in every case where the real estate has been or hereafter shall be taken in execution, and appraised, before or after the passing of this act, the defendant shall not have the benefits of the same, unless he shall on or before the first day of August next, and every six months thereafter pay to the plaintiff, the amount of interest due on such judgment. But in the first place this proviso applies only to the act of 1821: the words are, "shall not have the benefits of the same," which refer to "this act." In the next place it ought not to be construed to extend to a case in which executions had issued under the former act. By the act of 1820, the defendant had acquired a vested right to a stay of proceedings for one year from the return day of the *levare facias*; and such right acquired while an act was in force, remains after the act has been repealed, or is expired. *Couch v. Jeffries*, 4 Burr. 2460. *Bedford v. Shilling*, 4 Serg. & Rawle, 401. *Fletcher v. Peck*, 6 Cranch. 88. *Calder v. Bull*. 3 Dall. 396. Even if the legislature, by the proviso of the act of March 27th 1821, intended to interfere with cases completed under the provisions of the act of 1820, in which the party had a vested right, they could not deprive him of it. The court will intend that the legislature did not mean to affect a vested right, or to have a retrospective effect, but contemplated only proceedings *de novo*.

5. The sale under the *alias* was void, because it was for less than two-thirds of the appraisement on the *levare*. The second valua-

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tion was a nullity, as the first remained not set aside or annulled by the court.

[The court intimated that the decision of the court below, being matter of discretion, was not the subject of a writ of error.]

Authorities may be shown in which the court entered into considerations of this tort. In *Pearson v. Morrison*, 2 *Serg. & Rawle*, 20, this court on a writ of error considered the propriety of the court's proceeding below in setting aside a levy, execution, and sale, on motion of the plaintiff's attorney, though it was said by the court, that the Court of Common Pleas possessed discretionary power over its own process. He also cited *Clark v. Baker*, 3 *Serg. & Rawle*, 470. *Duncan v. Robeson*, 2 *Yeates*, 454. *Burd v. Dansdale*, 2 *Binn.* 92. This was not a case of pure discretion in the court below: for the court were bound by the act of assembly, and erred in giving a wrong construction to it.

6. The writ of *levari facias* is insensible and inoperative. It does not command the sheriff to levy. Unless it can be amended by the *præcipe*, it is altogether erroneous.

M'Ilvaine, contra.

1. and 2. It is not sufficient to constitute a sale that the property should be struck off: all the conditions of sale must be complied with before a sale can be said to be made. The sheriff's return here is in substance that no sale was made. The act of 1705, sect. 8. (*Purd. Dig.* 198) directs the sheriff in case the lands cannot be sold on a *levari facias*, to return that he exposed them to sale, and that they remained unsold for want of buyers: but this is put only by way of example; and he may make a special return according to the facts. In *Zantzinger v. Pole*, 1 *Dall.* 419, the court say, that if the property is not paid for after a sale, the sheriff's return should be that "the premises were knocked down to A. B. for so much, and that the said A. B. has not paid the purchase money, and that therefore the premises remain unsold." The return of the sheriff must show obedience to the writ or a good excuse. 6 *Com. Dig.* 228, *Return D.* 1. The sheriff cannot be compelled to alter his return in matter of fact. *Vastine v. Fury*, 2 *Serg. & Rawle*, 430. All the court can compel the sheriff to do is to make a certain return. This return is sufficiently certain to give the party a remedy against the sheriff. The substance of it is, that the property remained unsold: the reason he could not make a title is entirely with the sheriff. But if the sheriff found that he could not make a title it was his duty to vacate the sale.

3. and 4. The case falls completely within the proviso of the act of 1821: the interest was not paid, as is thereby required, and therefore the defendant is debarred of its benefits. It is argued that the legislature did not mean to act retrospectively, but the language of the act is explicit on that subject. It embraces "every case where real estate *has been*, or hereafter shall be taken in exe-

(Peddle v. Hollinshead. Cozens v. Hollinshead.)

execution or appraised *before* or after the passing of that act." It is also objected that the act of 1820 conferred a vested right, which could not be defeated by the expiration of that act, or the modification of the act of 1821. But the act of 1821 merely restored to the creditor a right which had been suspended by the former act. If injustice was done by the legislature, it was to the creditor in the first instance, and they afterwards removed the barrier to the prosecution of his rights. The legislature however has always exercised a power over process. Besides, the act of 1820 did not exist after the 27th March, 1821, except as modified by it: and acts begun under a law which is expired or repealed cannot be continued. 3 *Sm. Laws*, 522 note, 4 *Yeates*, 394.

5. In the court below, on the question of the validity of the sale in *October*, 1821, much evidence was adduced of which the court here is not informed by the record. It was decided on motion, and it is a matter for the sound discretion of the court below, whether to set aside a sale or not. It cannot be inquired into on a writ of error. This court cannot inquire on error into the abuse of process or misfeasance of the sheriff acting in obedience to the writs issued from another court. If the sheriff has sold when the law forbade it, which was by no means the case, he is responsible for it: but this court cannot inquire into the sale if the writs be regular.

6. As to the form of the *levari facias*, there was an error in leaving out the words, "you cease to be levied," which the court will amend if necessary, though it may well be contended that enough appears from the whole writ to show a command to the sheriff. If it be a defect it is cured by the statutes of jeofail. The *præcipe* orders the prothonotary to issue a *levari facias*: and if he has committed a misprision, the court will disregard it. Amendments may be made after as well as before writs of error. 4 *Yeates*, 185, 479, 205. 4 *Dall.* 267. 1 *Dall.* 197. 1 *Binn.* 486.

The opinion of the court was delivered by

DUNCAN, J. The points in both cases are the same, and have been so considered in the argument. I am decidedly of opinion, that the only questions which can be considered by this court, on these writs of error, and on the specific errors assigned are, whether the writs of *levari facias* on which the sales were made, were warranted by existing laws, and whether this was in fact a command to sell, or that omission can be taken advantage of in error, and if it can, whether the writ can be amended by this court. The material question depends on the construction and operation of the two acts of assembly, one of the 28th March, 1820, 7 *Bioren's St. L.* 335., and the act of 27 March, 1821; page 423. The first directs, "on execution, appraisement of land shall be had, and if it will not sell for two-thirds of its appraised value, sheriff shall so return, and further proceedings be staid for one year." The act to continue in force one year and no longer. The second continues

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the first four sections of the act of 1820, for one year, provided "that in every case, where real or personal estate has been, or hereafter shall be, taken in execution or appraised, before or after the passing the act, the defendant shall not have the benefit of the same, unless he shall, on or before the first day of *August* next, and every six months thereafter, pay to the plaintiff or plaintiffs, his or their agent or attorney the amount of interest, due on such judgment or judgments," and the argument is, that inasmuch as there had been an attempt to sell, and a return of unsold for want of buyers, while the act of 1820 was in full force, and as that act declared, that when the property could not be sold for two-thirds of its appraised value, the proceeding shall be staid for one year from and after the return of the writ, that the act of 1820, as to such cases, was necessarily extended to one year after the return of the writ. That the right to a stay of sale was a vested right, not affected by the expiration of the law, and that the legislature could not add the qualification of payment half yearly, to an indulgence which had been previously granted without any condition. This indulgence cannot be considered as a vested right, which neither repeal nor expiration of the law could affect. For certainly, if the legislature could constitutionally grant the indulgence to the debtor, and suspend the creditor's right of recovery, they could restore it by a subsequent law, and take off the suspension. It was a favour granted to the debtor, at the expense of the creditor; a favour which if the legislature could confer, they could withdraw. The act of 1820, standing alone, without any continuance or prolongation by the act of 1821, expired by its express limitation in one year after its passage, and would have left the law and the courts of justice open to the creditor, as much as if it had never passed. It placed the creditor and debtor in *statu quo*.

If a temporary statute expires, all that has been done under it ceases with it; unless a perfect and complete right is acquired or title vested under it. An offence against a temporary statute cannot be punished after the expiration of the act, unless particular provision is made for that purpose. 7 *Wheat*. 551; nor any seizure made after its expiration, though the act giving the right had occurred before. 6 *Cranch*. 208. Nor can a sentence of condemnation be affirmed if the law has expired, although sentence of condemnation and money paid over before the expiration of the law. So where privileges attached by proceedings actually commenced, and the law is afterwards repealed, as under insolvent debtor's act, after the prisoner complied with every regulation, and proceedings continued without his consent to a day subsequent to the repeal of the act, he cannot be discharged, although he had actually assigned his property. *Miller's Case*, 1 *W. Bl.* 451. 3 *Burr*. 1456.

There is no difference, in this respect, between a statute expiring by its own limitation, or repealed. The act of 1821, was a substitute for the act of 1820. The first act was probationary, or experi-

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mental, to see how the indulgence would work for one year. The latter act revising the whole subject matter of the former, and indirectly intended as a substitute for the former one, though the former one had been not temporary, must, in presumption of law, as well as reason and common sense, operate to repeal the former. *Bartlett v. King*, 12 Mass. 545. Another act passed the 2d April, 1822. 7 Bioren's St. L. 568, continues in form the act of 1821, for the appraisement of estates taken in execution, until the 1st November, 1822, thus giving the sense of the legislature, that this act was the only one in force. On the expiration, the legislature thought it would be unjust to deprive the creditor of his legal remedies, for the recovery of his debt, unless the debtor paid him at least the interest, and it never could be the intention of the legislature, to postpone the vigilant creditor, merely because he had made an unsuccessful attempt to sell for two-thirds the amount of appraised value.

As to the exception, that no further execution could issue, the sheriff having returned a sale; the sheriff did return an attempt to sell, knocking down of the premises, but this had been ineffectual, because he could not make a title therefor, and he, therefore, returned it unsold for want of buyers. This might be a safe return by the sheriff in point of fact, for it was not a fair sale, if it was represented that the title was good, and unknown to every one there was a latent defect of title; as if debtor had conveyed before mortgage or judgment, then it would be a just return. But he did return it unsold for want of buyers. He might be liable for his false return, but still the plaintiff could issue a new execution, leaving all who might suppose they were aggrieved by this return, to their action against the sheriff. The sheriff not having received the money on an effectual sale, there could be nothing to prevent plaintiff from going on to complete his execution. If the sheriff had returned that he had sold, but could not make a title, this might have been a sufficient return, but returning it unsold, this enabled the plaintiff to take out a new writ. See 1 Peters, 245. If the money was not paid, he must return it unsold for want of buyers. This return certainly showed the exigency of the writ had not been complied with. The plaintiff had not the fruit and end of his execution, and was entitled to a new one. If the purchaser did not comply with the terms of the sale, it was the same thing as if it had not been struck off, the remedies of all parties against the bidder not complying being open to them. The omission in the writ, directing the sheriff to levy the debt, is a mere clerical mistake, which the *præcipe* would cure. The writ commands him to have the money, but does not, as it ought, command it to be levied off the mortgaged premises. The clerk should alter the present form of execution, by the form used in the Supreme Court.

Erroneous teste of *fieri facias*, the execution is amendable. *Baker v. Smith*, 4 Yeates, 185. *Berthon v. Keely*, 4 Yeates, 205. So teste

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and return of *venditioni exponas*. *Shoemaker v. Knorr*, 1 *Dall.* 197, and the amendments have been made in the court of errors, as in *Black v. Wistar*, 4 *Dall.* 267, where judgment and *feri facias* differed, this was a mistake of the clerk, not of the party, and may be amended after error brought by the *pærcipe*. And the court will issue a *certiorari* to bring up the *pærcipe* to amend by. In *Prevost v. Nichols*, 4 *Yeates*, 483, the power of the court above to amend was asserted and exercised. In matters arising from the mere *carelessness of the clerk in process*, it is to be observed, that those things which are amendable before the writ of error brought, are amendable after the writ of error brought, and if the Inferior Court doth not amend them, the Supreme Court may amend them; and this has been allowed in times when courts were not so liberal in granting amendments as at the present day. *Blackmore's Case*, 8 *Co.* 162. *a.* But the defendant in error must pay the costs of amendment, *Gilb. H. C. P.* 167, 182, and executions.

Judgment affirmed.

[PHILADELPHIA, MARCH 31, 1823.]

INGRAHAM *against* BOCKIUS and another.

IN-ERROR.

If a servant, in the course of delivering out goods to customers, make memoranda, and the same night, or next day, entries are made by the master, in books, from these memoranda, such books are books of original entries, and are admissible, accompanied with the master's oath, as evidence to charge a customer.

ERROR to the Common Pleas of *Philadelphia* County.

This suit was brought by *Peter Bockius* and *Rudolph Bockius*, plaintiffs below, against *Francis Ingraham*, to recover the value of a certain quantity of meat, alleged to have been sold and delivered to the defendant by the plaintiffs. On the trial, the plaintiffs produced *John Vasey*, a witness, who swore, "that he was employed by the plaintiffs during the years 1816, 1817, 1818, 1819, to do business as a butcher for them, according to the course of their business, that of butchers, which was to kill one day, and carry the meat round the next day to customers, who lived at some distance from the plaintiff's residence. That the defendant was a customer, and took meat. That the said *John Vasey* kept memoranda with a pencil, for his own use, of the meat he sold, and of the persons he sold to; two books, in which the same were made, being produced, and part of another; but that the same were, in general, destroyed, those being the only memoranda to be found—and the same night, or the next day, the same was entered in their books, and that he, *Vasey*, stood by, and the same were called over twice to see if they were correct." The plaintiffs then offered the entries in the plaintiffs

(Ingraham v. Bockius and another.)

books, (made from the said memoranda,) as evidence of the sale, and delivery of the meat to the defendant, the plaintiffs having previously sworn, that the books into which the memoranda were so as aforesaid copied, were their books of original entry, and the entries made in their hand writing. The defendant objected to the reading of the entries in the said last mentioned books, contending, that the same were not original entries, nor the said books, books of original entry, and prayed the court not to admit the same to be read, as evidence to the jury, to charge the defendant. The court, however, did permit the same to be read to the jury. The defendant then objected, that the said last mentioned books and entries, were not evidence of the sale and delivery of goods to the defendant, and requested the court to charge the jury, that the same were not evidence of the sale and delivery of goods to the defendant; but the court charged the jury, that the same were evidence of the sale and delivery of goods by the plaintiffs to the defendant. To the admission of which said evidence and charge, the defendant excepted.

The plaintiff in error assigned the following errors:

1st. That the court below erred in permitting the plaintiffs to read, as evidence, to the jury, the entries in the books of the said plaintiffs, copied from the memoranda, made by *John Vasey*.

2d. That the court below erred in charging the jury, that the said entries so copied into the said books, were evidence of goods sold and delivered to the defendant by the plaintiffs.

Ingraham, for the plaintiff in error, contended,

1st. That the books of the plaintiffs, received in evidence by the court below, were erroneously admitted, to prove goods sold and delivered, or labour done. The books of a plaintiff are admissible, when supported by the oath of the party keeping them; but original books of entry only fall within the rule. The book, in this case, was not a book of original entries, but only a copy from the book of original entries, which consisted of the memoranda made by *Vasey*. They ought to have been produced, and were the only regular proof. In *Ogden v. Miller's Executor*, 1 *Browne*, 147, entries on a slate, afterwards transferred to a book, were held not to be evidence of a tavern account. In *Sterret v. Bull*, 1 *Binn.* 235, this court say, that where clerks are employed, and the entries are made by them, there is no reason for allowing the book to be given in evidence as a book of original entries. But if a transcript from the entries made by a clerk be evidence, this salutary principle may easily be evaded. In *Rodman v. Hoops' Executors*, 1 *Dall.* 85, the court directed the jury, that they should pay no regard to a ledger, allowed to be read in evidence, if they thought it a transcript from a waste book. In *Vance v. Faris*, 2 *Dall.* 217, entries made some months after the transactions between the parties, were rejected. He also cited *Rogers v. Old*, 5 *Serg. & Rawle*, 404.

2d. The charge of the court was, that the books were evidence

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of the sale and delivery, which can only mean, that they were conclusive evidence. Whereas, books of original entry are no more than *prima facie* evidence.

Castor & Condie, contra.

1st. The evidence given by the plaintiffs was very strong: country butchers delivered out meat to their servant, who distributed it to their customers, and the same night, or next day, the entries were made. It is quite as strong as the case of *Price v. The Earl of Torrington*, *Salk.* 285, where the plaintiff's draymen gave him an account of beer delivered out, which he set down in a book, to which the draymen set their hands, and after the death of the draymen, their handwriting was proved, and held sufficient. To constitute it a book of original entries, it is enough that the entries were made at, or near the time of the transaction. *Curren v. Crawford*, 4 *Serg. & Rawle*, 3.

2d. The court did not charge, that the entries were conclusive, only that they were evidence.

Reply. *Earl Torrington's* case depended on the signature of the draymen who were dead. But in this case, what the servant told the master, was only hearsay evidence.

The opinion of the court was delivered by

GIBSON, J. Nothing appears to show that the book admitted to go to the jury, was not a book of original entries. *Vasey*, the witness, acted in the capacity of a servant, to deliver meat to the customers, and not in that of a book-keeper; and his memoranda, made with a pencil, he swore were only for his own use, to enable him to render a true account to the plaintiffs, of the meat sold. His memoranda, therefore, are not to be viewed in the light of the original entries of the plaintiffs, who did not direct them to be made; or at least, for any other purpose than to obtain an accurate account of the sales to his customers. It is clear, these memoranda were not considered as evidence, to charge the customers, either by the plaintiffs, or *Vasey*; or as any thing else than brief notes of the transactions occurring in the course of the business, and made at the time, with a view to be used when the regular entries came to be made in the books. These entries the witness swore were made on the night of the day of delivery, or the next morning, while the witness stood by, and the memoranda were called over twice, to see whether every thing was right. This case is very like *Curren v. Crawford*, 4 *Serg. & Rawle*, 3, except that it is stronger; the person who delivered the articles charged, being produced, and the original memoranda either produced, or their loss proved. What more could possibly be done? The entries were made in a course of dealing between the parties, at or about the time of the respective transactions; and in the usual course of the plaintiffs business: this was, in all reason, sufficient to entitle them to be read.

Judgment affirmed.

[PHILADELPHIA, MARCH, 1823.]

THURSTON and others *against* FISHER, Administrator of
DAWES.

DEMURRER.

The residence of a plaintiff within the State of *New-York*, at the time when the debt accrued, and since, does not bring him within the proviso of the act of limitations in favour of persons beyond seas.

A party entitled to the benefit of the proviso, loses his privilege from the time he comes into the State: and a replication to a plea of the act of limitations, not stating that the plaintiff had not been in the State within the time allowed by the act, is bad on demurrer.

DECLARATION in assumpsit on a policy of insurance, to which the defendant pleaded *non assumpsit infra sex annos*. The plaintiffs replied, that at the time when the cause of action mentioned in the declaration accrued, the plaintiffs, and each of them, were resident out of the State of *Pennsylvania*, in the State of *New-York*, and always since, have continued to reside there, at all times, and at present, and that neither of them ever returned to, or resided in *Pennsylvania*. General demurrer.

Wharton in support of the demurrer, made two points.

1st. That the residence of the plaintiffs in the State of *New-York* does not bring them within the saying of the act of limitations.

2d. Supposing, in general, the law to be in their favour on that point, yet the replication does not set forth the necessary facts.

1st By the act for the limitation of actions, passed the 27th of *March*, 1813, *Sect. 1*, *Purd. Dig.* 419, all actions upon the case shall be brought within six years after the cause of such action, and not after. By the 5th section, it is provided, that if any person, entitled to such action, at the time of any cause of such action given or accrued, fallen, or come, shall be beyond the sea, then such person may bring his action, so as he brings the same within the time before limited, after returning into this province. This statute being beneficial, the proviso is to be strictly construed. It gives an advantage to foreigners at the expense of our own citizens. If the phrase "beyond sea," is literally construed, then *New-York*, where the plaintiff resided, is not beyond sea, though it may be reached by sea. If this, however, were sufficient, *New-Jersey* would also be beyond sea. But the intent of the legislature was, to protect those who were absent in a foreign country, and are thus disabled from conveniently bringing suit. The saving clause does not apply to citizens of other states, who are under a common government, and who, by the constitution of the *United States*, are entitled to the privileges of citizens in the several states. *Art. 4, sect. 2*. The authorities are with the defendants, as well as the reason that governed the legislature. In *King v. Walker*, 2 *Bl. Rep.* 286, *Scotland* was held not to be beyond sea. This is the only *English*

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case to be found on the point. In this country the question has frequently occurred. In *Gustine v. Brattle, Kirby*, 299, absence at *Halifax*, was held not to be over sea, which was the expression in the *Connecticut* statute. In *Ward v. Hallam*, 2 *Dall.* 217, 1 *Yeates*, 329, *S. C.*, the point was made in the Supreme Court of this state, in the year 1794, whether the plaintiff's being a citizen of, and resident in *South Carolina*, while the defendant was a citizen of, and resident in *Pennsylvania*, brought the plaintiff within the benefit of the proviso, and, after argument, the court gave judgment for the defendant. This case may be considered as settling the law on the subject, and the court will not, without very cogent reasons, depart from a solemn decision on the point in dispute.

That provisos of this description are not favourably viewed by the legislature, is apparent from the repeal, by the act of the 11th *March*, 1815, of the proviso in the act of 26th *March*, 1785, sect. 4, relating to lands, saving the right or title of persons beyond the seas, or from, and without the *United States of America*. This proviso in the act of 26th *March*, 1785, sect. 4, is one of several analogous enactments by the legislature showing, that by the words, beyond seas, were meant, out of the *United States*. Other acts to the same effect, are the act of 13th *April*, 1791, sect. 20, *Purd. Dig.* 574, concerning writs of errors, and appeals from the Registrar's Court, which saves the rights of persons out of the limits of the *United States of America*, for five years after their return into some one state of the *United States*. The act of 19th *April*, 1794, *Purd. Dig.* 292, concerning the descent of intestates estates, by the 18th section of which, any relation out of the limits of the *United States*, may claim within seven years after his return into the *United States*: and the act of the 4th *April*, 1797, sect. 4, *Purd. Dig.* 495, providing, that debts of deceased persons shall not be a lien longer than seven years, excepting debts due to persons out of the *United States of America*.

2d. The replication is, at all events bad. It does not aver that the plaintiff has never come into *Pennsylvania*, since the cause of action accrued. A person who comes into the state, is within the meaning of the law, whether he comes to reside or not. In *Strithorst v. Græme*, 3 *Wils.* 145, 2 *Bl. Rep.* 723, the court say, that if the plaintiff is a foreigner, and does not come into *England*, in fifty years, he has still six years after his coming into *England* to bring his action. The same principle was adopted in *New-York. Ruggles v. Keeler*, 3 *Johns.* 263. The Supreme Court of the *United States*, in *Faw v. Roberdeau's Executors*, 3 *Cranch*, 174, decided, that if an act of limitations have a saving clause in favour of all persons out of the Commonwealth three years after their disabilities are removed, a creditor resident in another state, removes his disability by coming into the Commonwealth, even for temporary purposes: provided the debtor be at that time within the Commonwealth.

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C. J. Ingersoll, contra.

1st. The argument of the defendant calls on the court to legislate, by striking out words in this act, and inserting those expressed in other acts on different subjects. The construction to be given by the court, must be of the words used in this act, which are essentially different from the language of other acts of assembly. And, whatever may have been former impressions, the latter authorities are decisive, that the words "beyond seas," mean out of the jurisdiction of the state. In the case of *Murry v. Baker*, 3 *Wheat*. 541, which occurred in the year 1818, it was determined by the Supreme Court of the *United States*, after argument, that the terms "beyond seas" in the proviso, or saving clause of a statute of limitations, are equivalent to *without the limits of the state*, where the statute is enacted; and the party who is without those limits, is entitled to the benefit of the exception. After this decision, no court in the *United States* ought to hesitate to adopt this construction: they ought all to coincide on a point in which the relative rights of the citizens of every state are concerned, when determined by the highest judicial authority of the general government. To the same effect as this case, are the words of C. J. MARSHALL, in *Fuw v. Roberdeau's Executors*, 3 *Cranch*, 177. "Beyond sea, and out of the state, are analagous expressions, and are to have the same construction." The case of *Ward v. Hallam*, was decided mainly on the authority of *Gustine v. Brattle*, a very absurd case: because it was there held, that *Halifax* was not over sea, within the meaning of the *Connecticut* act. In *Sleght v. Kane*, 1 *Johns. Case*, 76, the Supreme Court of *New-York* held, that the defendant being within the *British* lines during the war, and departing with the *British* at the close of the war, was to be deemed *out of the state*, within the saving clause of the act of limitations, during the whole time, because he was out of the jurisdiction of the state: he was *quasi* out of the realm, and no writ could run against him.

2d. The replication is in the precise words of the act of assembly. It is in conformity with the precedent in 2 *Chitt. Plead.* 655, which uses the word, *return*. The replication in 3 *Wentworth*, 205, departs from the words of the statute 21 *James I.* The defendant cannot, however, make this objection on a general demurrer. He ought to have demurred specially, or he might have rejoined and set forth such facts as would have shown that the plaintiffs had been within *Pennsylvania*, since the cause of action accrued, and six years before the suit. He also cited *White v. Bailey*, 3 *Mass. Rep.* 271.

Rawle, in reply. It is an established rule in pleading, that the defendant may demur to part of a declaration, and take issue on the other part: but a plea, or replication is entire, and if it be bad in part, is bad for the whole, and in that case, the demurrer should be to the whole plea or replication. 1 *Chitt.* 643. On a general demurrer the whole law is brought before the court, and therefore,

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the principal point is to be decided. On this point the case of *Ward v. Hallam*, is conclusive: and the spirit of this case has been preserved by all subsequent acts of assembly. That case was deliberately settled, on principle: not on the authority of *Gustine v. Brattle*. The plaintiff relies on the decision of the Supreme Court of the *United States*, in *Murry v. Baker*: that case was on an act of the State of *Georgia*, which was not quite the same as our act. The other case of *Faw v. Roberdeau's Executors*, was on an act of the State of *Virginia*: and it does not appear that the State Courts of *Virginia* had decided to the contrary. The State Courts are not bound by the decisions of the Supreme Court of the *United States*, in the construction of acts of assembly. In *The Bank of the United States v. Fitzsimmons*, 3 Binn. 342, in the question concerning the lien of judgments under the act of assembly of the 4th April, 1798, this court decided against the opinion of WASHINGTON, J. in the Circuit Court of this District, in the case of *Hurst v. Hurst*, 3 Binn. 347, note. So on the act of 3d of April, 1792, for taking up lands west of the *Ohio* and *Alleghany*, this court and the Supreme Court of the *United States*, persisted in different opinions. We rely, therefore, on the decision in *Ward v. Hallam*, as settling the construction of the act of limitations on this point.

The opinion of the court was delivered by

GIBSON, J. This act of limitation is to be construed according to the real intention of the legislature, at the time it was made; and we are enabled to ascertain this in some measure, by a recurrence to other acts of assembly. The act of the 26th of March, 1785, which prescribes a limitation to actions brought to recover possession of land, has a proviso nearly in the words of the act under consideration. This proviso is repealed by the act of 11th March, 1815, so far as it relates to persons "beyond the seas, and from, and without the *United States of America*;" which clearly shows the understanding of the legislature on the subject; for if they had supposed any to be included within the proviso, who were out of the state, and not out of the *United States*, the repealing clause would have embraced them specially. That, however, was thought to be unnecessary. In the act of the 13th of April, 1791, which limits the time of bringing writs of error, the proviso is in favour of those who shall be "out of the limits of the *United States*;" which must be understood to be intended as equivalent in meaning to the words "beyond sea." In 1713, when the act under consideration was passed, there was no confederation of the states, and there was, therefore, no apt and definite term to express absence from the *British* possessions in *America*, and this I take to be the reason why the term "beyond sea," which means the same thing, was borrowed from the *English* law. "By the *English* law," says Sir Wm. Blackstone, "children born in wedlock may, in some instances, be bastards: as if the husband be out of the

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kingdom of *England*, (or as the law somewhat loosely phrases it *extra quatuor maria*,) for above nine months, so that no access to his wife can be presumed." Now it is to be noted, that the notion our ancestors attached to being out of the kingdom was, absence beyond the four seas; the narrow seas, whether by right or by wrong, being claimed as a part of the *British* domain. *Extra quatuor maria*, was precisely the same meaning as the words beyond sea; and it is, therefore, difficult to discover on what ground the *English* courts extended the saving in their statutes of limitation to persons in *Ireland*, unless that country, being a separate kingdom, were considered to be no part of the realm. What effect the union of *Great Britain* and *Ireland* may have on the construction of this clause in their act, remains to be seen. When, however, our legislature came to pass the act of 1705, against adultery, instead of using the words, beyond sea, to signify absence from the *British American* possessions, as the subject required peculiar accuracy of expression, the object being to define a criminal offence, they declare that a married woman having a child born of her body, when the husband "has not been in some of the Queen's colonies or plantations in this continent, betwixt the eastmost parts of *New-England*, and the southernmost parts of *North Carolina*," within twelve months preceding the birth, shall be punished as an adulteress. But in all acts passed after the union of the states, we find the saving extended only to those who are out of the *United States*. Why then extend the saving to those who are only out of the state? That, beside being contrary to the common acceptation of the phrase, would extend the benefit to a class of persons who are not within the reason of the provision. The intercourse between the states cannot be suspended by hostilities, or impeded by the risques and uncertainty of communication by sea. By the constitution of the *United States*, the citizens of the union have equal privileges in each particular state, and tribunals are provided expressly for the impartial administration of justice between citizens of different states. The states are held together not only by a common political bond, but their intercourse is facilitated by a similarity of customs, language and laws; and in this respect there is a difference between them and the subjects of foreign governments, which might well be thought to call for a distinction, with respect to the necessity of prosecuting a right of action. The only thing to favour a contrary construction, is found in the saving clause itself, which allows the statute to begin to run from the time of the party's "returning into the province," and hence it is inferred, that the party must necessarily have been within the saving, while he was barely out of the province. But it is plain from the context, that by returning into the province, the legislature meant returning from beyond sea, or to speak more accurately, into the *British* possessions in *America*.

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The point, however, has already been decided by this court, on due consideration; and unless, therefore, it were palpably wrong, we would not be justified in departing from that precedent. With respect to the case of *Murray v. Baker*, 3 *Wheaton*, 541, decided by the Supreme Court of the *United States*, I can only say, that all the decisions of that court are entitled to great respect; but unless in cases where it has appellate jurisdiction, and may revise and correct the decisions of the state courts, its opinions are not conclusive; and however proper its decision may have been with respect to the statute, on which it was called to put a construction, it can furnish no satisfactory guide to us in the construction of our own acts of assembly.

Beside the general principle involved by the demurrer, there is an objection to the plea, which this decision of the general question would render it unnecessary to consider. The plea merely states, that the plaintiff was *resident* out of the state, without specially denying that he had been in the state within the period material to the question; and we are all of opinion, that even if absence from the state were sufficient to satisfy the saving clause, still the want of this negative averment would render the plea faulty. There is no clearer rule of pleading, than that a party who wishes to bring himself within the benefit of an exception, must expressly aver every fact and circumstance necessary to do so, whether it be negative or positive. A party whose right of action is protected by his absence, loses his protection the instant he sets his foot within the prescribed limits; for from that time, the statute begins to run. The defendant must have judgment.

Judgment for defendant.

[PHILADELPHIA, April, 7, 1823.]

KLINE *against* WOOD.

IN ERROR.

Where some of the counts of the declaration in an action of assumpsit, were for damages sustained by the defendant's selling to the plaintiff an unsound horse, for the sum of 80 dollars, and the verdict was for 40 dollars, held that the cause of action was not within the jurisdiction of the District Court of the city and county of *Philadelphia*, though these counts averred that the plaintiff had been put to expense in feeding and keeping the horse, to the amount of 150 dollars.

The District Court has not jurisdiction in cases of contract, where the value of the thing put in demand by the plaintiff's declaration, is under 100 dollars.

The District Court has not jurisdiction wherever the plaintiff could not recover costs, if he had sued in the Court of Common Pleas, before the erection of the District Court, without having filed an affidavit.

Query, what would be the criterion to determine the value of the matter in controversy in cases of contract, where the award of arbitrators in an action in the District Court is under 100 dollars?

The Court of Common Pleas of the county of *Philadelphia*, have jurisdiction in civil actions, where the demand is under 100 dollars, but the plaintiff cannot recover costs.

If a general verdict be given on several counts, some of which are for demands not within the jurisdiction of the court, it is bad for the whole.

ERROR to the District Court for the city and county of *Philadelphia*.

Samuel R. Wood, the plaintiff below, brought this action against *John Kline*, the defendant below, in assumpsit on the warranty of the soundness of a horse.

The declaration stated in the *first* count, that on, &c. at, &c. in consideration that the said *Samuel*, at the special instance and request of the said *John*, would buy of him a certain horse, at and for a certain price or sum of money, to wit, the price of 80 dollars, to be therefor paid by the said *Samuel*, he the said *John* undertook, and then and there faithfully promised the said *Samuel*, that the said horse then was sound; and the said *Samuel* avers, that he, confiding in the said promise and undertaking of the said *John*. did afterwards, to wit, on, &c. at, &c., buy the said horse of the said *John*, and then and there paid him for the same, the said sum of 80 dollars; nevertheless the said *John*, contriving, &c. did not perform, &c., but thereby craftily and subtly deceived and defrauded the said *Samuel* in this, to wit, that the said horse at the time, &c. was not sound, but on the contrary was at that time unsound, whereby the said horse became and was of no use or value to the said *Samuel*, and he the said *Samuel* hath been put to great charges and expenses of his monies in and about the feeding, keeping, and taking care of the said horse, in the whole amounting to a large sum of money, to wit, the sum of 150 dollars. The *second* count stated, that afterwards, to wit, on, &c. at &c., in consideration that the said *Samuel*, at the like special instance and request of the said *John*. had then and there bought of the said *John* a certain

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other horse, at and for a certain other price or sum of money, then and there agreed upon between the said *Samuel* and the said *John*, he the said *John* undertook, &c., that the said last mentioned horse, at the time of the sale, was sound: nevertheless the said *John*, contriving, &c. did not perform, &c., but craftily and subtly deceived and defrauded the said *Samuel* in this, to wit, that the said last mentioned horse, at the time of the sale thereof, was unsound; whereby the same horse then and there became, and was, of no use or value to him the said *Samuel*, and he the said *Samuel* hath been put to great charges and expenses of his monies, in and about feeding, keeping, and taking care of the said last mentioned horse, in the whole amounting to a large sum of money, to the sum of 150 dollars. The *third* count was for 150 dollars, money lent and advanced, paid, laid out, and expended, and money had and received: *conclusion*, to the damage of the plaintiff 200 dollars. The defendant pleaded, *non assumpsit*, with leave to give the special matter in evidence. The jury gave a verdict for the plaintiff, for 40 dollars damages; and on motion by the defendant in the court below to arrest the judgment, the court overruled the motion.

Stroud, for the plaintiff in error, now contended, that the court below had no jurisdiction, the sum in controversy being under 100 dollars. The act of 30th March, 1811, *Purd. Dig.* 332, erecting the District Court for the city and county of *Philadelphia*, provides, in the first section, that the District Court shall have no jurisdiction except where the sum in controversy shall exceed 100 dollars; and the court is continued by subsequent acts with the same jurisdiction. In this suit, the demand of the plaintiff, in point of law, was, for the difference between the money paid for the horse, and the price for which he was resold, if a resale took place, or his value, if the plaintiff retained him. If the horse were worthless, the plaintiff's claim could only be for 80 dollars which he paid and interest: but by the verdict of the jury it appears, that the loss actually sustained was but 40 dollars. So that considered in any point of view, the court had no jurisdiction of the case. In actions founded purely in tort, such as trespass *vi et armis*, &c., there is no standard by which the sum in controversy can be estimated, but the amount of damages laid in the declaration. *Ancora v. Burns*, 5 Binn. 522. This rule however does not hold in matters of contract. The party might give the Supreme Court jurisdiction, as well as the District Court, in actions of debt or assumpsit, if it were sufficient to lay the damages in the declaration at a sum above 100 dollars.

Barclay, contra. Where a cause is tried upon its merits, the court will support the verdict if possible. This verdict was given after a full hearing, and the court below, who judged from the evidence on the trial, refused to arrest the judgment. The action here is not assumpsit for a sum certain: but to recover damages for breach of warranty, and sounds in tort. The value of the horse was not

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necessary to be stated in the declaration, and was immaterial: the sum in controversy was the damages sustained by the plaintiff, in consequence of the purchase and warranty, which is stated at 150 dollars, and the facts might perhaps have justified another jury in giving that sum. The declaration states, besides the loss of the horse, that the plaintiff was put to great expense in feeding and taking care of him, altogether to the amount of 150 dollars. He cited *Smith v. Rutherford*, 2 *Serg. & Rawle*, 360. *Wilson v. Daniel*, 3 *Dall.* 401. *Hancock v. Barton*, 1 *Serg. & Rawle*, 271. *Hulscamp v. Teel*, 2 *Dall.* 356. *Bazire v. Barry*, 3 *Serg. & Rawle*, 461.

Stroud, in reply. Notwithstanding the conclusion of the declaration, the difference between the price at which the horse was bought, and was afterwards sold, is the only criterion of damages. The expense of horse keeping, or any resulting damage, could not legally be taken into consideration by the jury.

The opinion of the court was delivered by

DUNCAN, J. The question raised respects the jurisdiction of the District Court of the city and county of *Philadelphia*; and where a court so highly respectable, and so deserving of all respect, have asserted and deliberately exercised a jurisdiction, their judgment is to be very fully considered by a court of supervision; and before they reverse it, they should feel a perfect conviction of the error.

It is not the case of a new jurisdiction, proceeding in a way unknown to the common law, but a common law tribunal, proceeding according to the common law, with a limited and defined jurisdiction. The act of 30th *March*, 1811, providing for an additional court within the city and county of *Philadelphia*, gives this court power to try, hear, and determine all civil pleas, and actions, real, personal and mixed; *provided*, that the said court shall have no jurisdiction, either originally, or an appeal, *except where the sum in controversy shall exceed 100 dollars*. It is contended, by the plaintiff in error, that on the face of the declaration it appears, that the sum really in controversy was under 100 dollars, and that the plaintiff never could, in this form of action, recover more than 80 dollars, the price of the horse. The defendant in error contends, that it is an action sounding in damages, partaking more of the nature of tort, than of contract; and that the claim of the plaintiff was 150 dollars, which must, in all cases, be taken to be the sum in controversy; the jurisdiction of a court not depending on the verdict of a jury, but on the claim of the plaintiff.

Keeping our eye on this declaration, however various the counts are, we must see that it is an action of assumpsit on the warranty of a horse sold by the plaintiff below, to the defendant, for 80 dollars. The ancient mode of declaring in cases of warranty, was in tort, on the warranty broken; but, of late years, it has been found more convenient to declare in assumpsit, for the sake of adding money counts. The

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propriety of this practice is generally acknowledged; it has prevailed for more than fifty years.

The first count in this declaration states the sale, the price 80 dollars, the warranty, and the unsoundness; and that the plaintiff was put to great charges and expenses of his monies, in and about the feeding, and taking care of the said horse, the whole amounting to 150 dollars.

The second count sets out the sale, warranty, and unsoundness of another horse, sold for a certain other price or sum of money, then and there agreed upon, the expenditure in keeping, &c. 150 dollars, and there is no material difference between the first and second counts, except that the second does not state any price for which the horse was sold.

The third count contains the usual money counts, for 150 dollars lent and advanced, and for money had and received, and the declaration concludes to the plaintiff's damage, 200 dollars. There is a general verdict and judgment on all the counts. We must consider this as one cause of action; the verdict being taken generally on all the counts, and the plaintiff having taken judgment on all. If it appears that the court had no jurisdiction on any one of them, the judgment must be reversed; for it cannot be known, on what count the verdict was taken.

It will be proper to take into view the several acts of the legislature with relation to the jurisdiction of justices of the peace, the Court of Common Pleas, and the District Court. They are all in *pari materia*, and evidence what was the real design and policy of the several enactments. By the act 1st *March*, 1745, all actions for debts or other demands, not exceeding five pounds, are made cognizable before any justice of the peace; and if any person shall commence or prosecute a suit for any debt or demand, in other manner than is directed by the act, and shall obtain a verdict or judgment for debt or demand, which without costs of suit, will not amount to more than five pounds, (not having previously filed an affidavit in the prothonotary's office, that he verily believed the debt due or damages sustained, exceeded the sum of five pounds,) he shall not recover any costs of suit. They excepted actions of debt for rent, or bond for performance of covenants, covenant, replevin, actions on any real contract, trover, slander, assault and battery, or imprisonment, and actions wherein the title to lands should in any wise come in question. The act of 10th *April*, 1794, enlarges the jurisdiction to twenty pounds; and the act of 20th *March*, 1810, extends it to all causes of action, arising from contract, either express or implied, in all cases where the sum demanded is not above 100 dollars, except in cases of real contracts, where the title to lands may come in question, or on promises of marriage. The provision in this act is the same with respect to costs, where a sum, not exceeding 100 dollars is recovered, as in former acts.

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By the act erecting the District Court, all jurisdiction is taken from the Common Pleas, in civil actions where the sum in controversy exceeds 100 dollars. It seems an opinion prevails, that the Court of Common Pleas of the city and county of *Philadelphia*, have no original jurisdiction of debts or demands, not exceeding 100 dollars. I cannot find any thing, in any act of assembly, touching the jurisdiction of that court, to give countenance to this opinion. Their jurisdiction only ceases, when the sum in controversy exceeds 100 dollars, for that is transferred to the District Court. The original jurisdiction is not taken away by the act extending the jurisdiction of justices of the peace. On the contrary, it is recognized. The suitor prosecutes his claim in that court, at his own risk of recovering no costs, just as he did before the District Court act. The jurisdiction remains unimpaired, either by the District Court act, or the 100 dollar act. It is not taken away in express terms, nor can they be deprived of it by any implication. Very different is it in the District Court. The act which calls it into existence negatives its jurisdiction, either originally or on appeal, where the sum in controversy shall exceed 100 dollars. The jurisdiction of the Common Pleas remains with it, in all cases where it is not transferred to the District Court, and in all cases where it is transferred, it is declared, that it shall thenceforth cease and determine. All courts of Common Pleas have original inherent jurisdiction; but the legislature have thought proper to provide, that if the suitor does not recover 100 dollars, he shall not recover costs. But it is said, there is some incongruity in this; that the plaintiff cannot secure himself in this Court of Common Pleas, as he can in the other courts, from payment of costs, by a previous affidavit. This may be so; but the reason is, that if the plaintiff makes the affidavit that his demand exceeds 100 dollars, he applies to a court, which, by his own affidavit, has no jurisdiction in the subject matter. It is a clear principle in the construction of statutes, that the jurisdiction of a court of record cannot be taken away, but by express negative words. 3 *Yeates* 479. 2 *Burr.* 1042. 1 *Wm. Bl.* 285.

The action in the present case is clearly an action on the contract; and it is an action on the contract, where there is a measure of damages, namely, the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty. In an action for the price of articles sold, the defendant may give in evidence by way of defalcation, a warranty of the articles, and a breach thereof. *Steigleman v. Jeffries*, 1 *Serg. & Rawle*, 477. It was there observed by the CHIEF JUSTICE, that the defalcation act did not embrace a claim of unliquidated damages for any matter in nature of a tort, because, in such case, there is no standard by which the damages can be estimated. But in the present case, the objection is not so strong. The amount of the damages, to be sure, cannot be reduced to a certainty; but the price agreed to be paid for the article purchased, is some rule in making

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the estimate; it is a boundary beyond which the damages cannot reasonably be suffered to pass; and Mr. Justice YEATES observed, this warranty was not a tort, where individual feelings determine the quantum of damages without any known standard. If the burr mill stones, the article warranted, were of so bad a quality, as to be wholly useless in the hands of the vendee, it would operate against a recovery of any part of the sum agreed on; if they are of so inferior a grade, that the mill stones would not sell for above two thirds, or one half of the sum which good mill stones would command, at a fair market, the sum recovered would naturally be in the same proportion: so that there would be some rule of estimating the damages sustained. *Ib.* On this principle, which is believed to be correct, what was the sum in controversy here? The difference between the value of a sound and an unsound horse, having regard to the price for which the horse was sold. The horse was sold for 80 dollars. Suppose him to be an inferior horse, or a worthless horse; still no more could be recovered than the value of a sound horse. That value was fixed on this horse by the agreement of the parties. I do not discover any legal principle that would justify, in addition to this, an allowance for keeping him.

It was at one time doubted, whether, if the horse was not immediately returned, there could be a recovery: but it was decided there might be a recovery, governed by the consideration of the difference in value between the horse, sound and unsound. Taking as the maximum, the price for which the horse was sold, if the party goes for more, his action should be in deceit, ease, which would include all special damages. It would be unreasonable, that the vendee should keep the horse for months or years, and then, not only resort to the vendor for the price of his horse, but for the expense of keeping him, and trying experiments on him. In the case of *Byrne v. Gordon*, 2 *Browne*, 275, there are many just observations made by the president of the court, and the criterion is a very just one, that to give the District Court jurisdiction, it must appear that the sum in controversy, exceeds one hundred dollars; though I cannot agree to one conclusion, that is, that the court before which the trial is, will judge from the evidence in the cause, what that sum is. For how would it be on a judgment on a report of arbitrators? There must be some other criterion: there is another criterion. In *Wilson v. Daniel*, 3 *Dall.* 407, the criterion of Chief Justice ELLSWORTH, appears to me to afford the best rule. The demand of the plaintiff, in these questions of jurisdiction, is not alone to be regarded, but the value of the thing put in demand; the nature of the case must certainly guide the judgment of the court. And when the law makes a rule, the rule must be pursued. Thus, in debt on a bond for £100, the principal and interest are put in demand, and the party can recover no more, though he may lay his damages at £10,000. The form of action, in that case, gives the legal rule. But in an action of trespass, and other torts, where

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the law prescribes no limitation to the amount to be recovered, the plaintiff has a right to estimate his damages at any sum. The damage stated in the declaration is the thing put in demand. The proposition then is simply this, where the law gives no rule, the demand of the plaintiff must furnish one: but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded, and of this opinion was Judge CHASE. There is something so plain, so just, and common sense-like, in this proposition, as to recommend it to respect, and command our approbation.

The legal cause of action was contract, and the law prescribed the rule, the estimate of the value between this horse in a sound and an unsound state; which value could never exceed the price given for the horse. But there is another criterion, and that is, where justices of the peace have jurisdiction of the sum in controversy. Wherever the plaintiff could not recover costs if he sued in the Court of Common Pleas, unless he had filed a previous affidavit, before the erection of the District Court, there the District Court have no jurisdiction. It was the policy of the legislature of this state, to confine to the inferior tribunals, the determination of such matters as these. They thought proper to confide in their jurisdiction, and so far as the Court of Common Pleas are concerned, the inferior jurisdiction is encouraged, by exposing the suitor to a loss of costs, where he has recourse to Common Pleas, and recovers less than 100 dollars, unless he has filed a previous affidavit. But still the Common Pleas have jurisdiction beyond that sum, and their judgment for the sum found for the plaintiff by the jury, though under 100 dollars, would be good; it would be reversed for the costs. My private opinion is, that it was not intended by the District Court act, and that the absolute prohibition of jurisdiction slipped in unwarily, while the intent, most probably, was, to place that court on the same footing as the courts of Common Pleas throughout the state. This is mere conjecture, and cannot prevail against the positive, clear words of the law, in the District Court act. The words are, "sum in controversy." In the 100 dollar act, giving justices jurisdiction, it is "of all causes of action arising from contract, where the sum demanded is not above 100 dollars." Now "sum demanded," and, "sum in controversy," have precisely the same meaning. The demand of a sum, is the sum in controversy. But this has been already settled, the question arose in *Sneivly v. Weidman*, 1 *Serg. & Rawle*, 417, and it was there determined, that an action of assumpsit on the warranty of a horse, was within the jurisdiction of a justice of the peace, under the act of 1st March, 1745, and 19th April, 1794, and that the plaintiff having brought his action in the Common Pleas, and recovered less than £20, he was not entitled to costs. This goes far to settle the present question. Debt and other demands, is not more comprehensive than the sum in controversy; yet the court held, that as the action was

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founded on contract, though the damages were uncertain, it was included in the words, debt or demand not exceeding £20.

Sum in controversy, does not signify a precise sum *in numero*, no more than the word demand does. Demands and sum in controversy, are the same. But this act is more comprehensive than the acts of 1745 and 1794. There are only two exceptions to the jurisdiction of justices, in actions founded on promise; and these are acts founded on a promise of *marriage*, and contracts respecting the realty. It is evident, that a justice of the peace had jurisdiction of this cause of action, and if it had been brought in the Common Pleas, before the erection of the District Court, the plaintiff could not recover costs, and the words of the act erecting this court, are too plain and unambiguous, to leave any doubt in our minds, that the District Court had no jurisdiction, and that it is quite inconsistent with the policy of the whole legislation on this subject, to enable the plaintiff to expose a defendant to the costs of suit in a superior court, by a bare suggestion, or conclusion to his declaration, that he claimed damages to a sum exceeding 100 dollars, where his cause of action shews he never can recover that sum.

This criterion will not apply to all cases. But the safest construction of this provision is, that where the declaration states a cause of action founded on a contract, where the subject matter exceeds 100 dollars, and the District Court gives judgment, there the jurisdiction is to be sustained, though the recovery is for less than 100 dollars. For if the ultimate recovery was to govern, then, though the sum was reduced by defalcation, this not appearing on the record, the plaintiff could not only not recover costs, contrary to all justice, but would be thrown out of court, and thus understood, the opinion of Judge HEMPHILL, in the case in *Browne*, would be quite correct, that the court would judge of the jurisdiction from the evidence in the cause. But where on the declaration the whole subject matter of the contract does not exceed 100 dollars, as it is set out in the declaration, there the want of jurisdiction appears on the record, and the court are bound to reverse.

In a matter before justices of the peace, the court, in examining the proceeding, may call in the aid of affidavits to see, whether they have exceeded their jurisdiction. *Bringenhofer v. Martin*, 3 *Yeates*, 479. But an award of arbitrators is different from a trial in court; and where the award is not for more than 100 dollars, in the District Court, in an action founded on contract, it is different from a judgment of a justice of the peace, and there it is difficult to ascertain what was the real sum in controversy, and what reduced by defalcation. The case does not call for any opinion, and it would be improper to anticipate, but there certainly is a distinction. See 7 *Cranch*, 276.

I had some struggle in my mind, in an endeavour to support this judgment, so far as respected the sum recovered, without costs, by

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considering, that the District Court stood in the same state as the Court of Common Pleas originally did in this respect. But the prohibition is found to be so strongly expressed, that it would be legislating, and not judging, so to decide.

The judgment must, therefore, be reversed.

Judgment reversed.

[PHILADELPHIA, APRIL, 7, 1823.]

M'CALL *against* LENOX.

If a bond and warrant of attorney are given accompanying a mortgage, a sale of the land under a *feri facias* and *venditioni exponas* issued on the judgment entered up under the warrant, avoids a lease made by the mortgagor, after the mortgage but before the entry of the judgment on the warrant.

This was an amicable action, instituted for the purpose of deciding, whether the defendant was entitled to the possession of a house at the north-west corner of Chesnut and Tenth streets, in the city of *Philadelphia*, purchased by him at sheriff's sale; from the day on which he received the sheriff's deed; or whether the plaintiff was entitled to the possession, by virtue of a lease prior to the judgment under which the defendant purchased. The case was as follows: *Peter L. Berry*, being seised of the house in fee, mortgaged it to *Thomas Armstrong*, by deed, dated the 12th *September*, 1813. *Berry* retained the possession, and afterwards, on the 4th *February*, 1814, made a second mortgage, accompanied with a judgment bond, to *Miles H. Hughes*, who assigned this mortgage and bond to *Daniel Mann*. On the 5th of *May*, 1814, *Berry* made a lease to the plaintiff, who was then in possession under a former lease from *Berry*, for the term of two years, to commence on the 1st *May*, 1815, on which the plaintiff paid all the rent in advance. On the 4th *February*, 1815, *Daniel Mann*, assignee of *Hughes*, entered judgment against *Berry* on the bond which accompanied his mortgage, and by virtue of a *feri facias* and *venditioni exponas* issued on this judgment, the mortgaged premises were taken in execution, and sold to the defendant, who received a deed from the sheriff, dated 3d *November*, 1815. The purchase money was applied, first to the payment of *Armstrong's* mortgage, and afterwards, to the payment of *Mann's*, as far as it would go, but was not sufficient to pay the whole.

Rawle Jun. and *Rawle*, for the plaintiff, contended, that the lease to the plaintiff, made by the mortgagor, between the date of the mortgage, and of the judgment on which the property was sold, was valid against the defendant. As it was made prior to the entry of the judgment, it is clear that it is good against the judgment alone; but the attempt of the defendant is, to bring in the mortgage in aid of the judgment, and thereby to defeat the lease. This cannot be

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done, where the mortgagee, who has his election to proceed on the mortgage by *scire facias*, or ejectment, or on the bond by *fieri facias*; chose to adopt the latter course. In the latter course of proceeding, the sheriff, on the *fieri facias* and *venditioni*, sells merely the right which the obligor had, and nothing more or less. All that he had was merely a reversion after the lease, subject to the mortgage: or, in other words, an equity of redemption; and this was all the defendant purchased. Does the circumstance of the bond and warrant accompanying the mortgage, make any difference? They are not inseparable, but are distinct securities, and the remedies upon them are distinct. On the bond and warrant, judgment may be entered in another county: or if in the same county where the land lies, other property, real or personal, may be levied on, or the person of the defendant taken by a *ca. sa.* If the party who has distinct remedies elects one, he is confined to that, and adopts it with all its legal consequences. He is considered as waiving the other. The defendant when he purchased had full knowledge of all these circumstances, and has no equitable claim. The mortgagee by proceeding under the judgment has adopted and confirmed the lease. The sale on the judgment does not affect intervening incumbrances. The mortgage remains a security, on which the mortgagee may still proceed.

J. Sergeant, contra. In this case the mortgage was on record before the lease was made, and the plaintiff took the lease in the face of the mortgage, and with knowledge that his possession was liable to be interrupted by the mortgagee. The objection is a strictly legal one, in which legal forms are set up in opposition to the equity of the mortgagee. It cannot, however, be doubted, that a mortgage with the bond it recites, make but one security: and if the bond is assigned, it carries the mortgage along with it. If the mortgaged premises are sold on the bond, they are discharged from the mortgage, and the purchaser stands as the assignee of the mortgage, and possesses all the rights held under it. It is a pledge which accompanies the judgment and passes with it. At law a mortgage is a conveyance of the real estate; the mortgagee may support ejectment, immediately on the default of the mortgagor. Whatever modification this principle has received has been in equity: but equity will never interfere to deprive the mortgagee of his security, nor can the mortgagor, by any act of his, affect the security he has pledged. The equity of the mortgagee is, to receive his whole debt out of the property. The sale was not of the equity of redemption in this case, but of the land itself. In *Bantleon v. Smith*, 2 Binn. 146, the lien for arrears of ground rent was held to remain, though the ground landlord had recovered judgment in an action of covenant for the arrears, and it was held to be entitled to a preference over judgments prior to the judgment recovered in the suit, which in principle is the same case as the present. Moreover it is there distinctly admitted, that a mortgage remains in full

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force, after a judgment obtained on the accompanying bond. To the same effect is *Gordon v. Correy*, 5 Binn. 552, in which it was determined, that a ground landlord does not lose his lien for the rent due, by taking a bond and warrant for the arrears, and entering up judgment.

Reply. The cases of *Bantleon v. Smith*, and *Gordon v. Correy*, are different from this case. The question in them was, whether the proceeds of sale might not be applied to pay an unextinguished lien. The question here is, not concerning lien, but as to the interest which passed by the sheriff's sale.

The opinion of the court was delivered by

TILGHMAN, C. J. The plaintiff contends, that no proceedings under this judgment can affect his lease, which was of a prior date. The question is, whether the judgment on *Berry's* bond, is so connected with the mortgage, as to give the defendant the advantage of the mortgage. If it is, the title of the defendant is prior to that of the plaintiff. It is certain; that the bond and mortgage are securities for one and the same debt; for which the mortgagee has three remedies. He may proceed by way of ejectment, to recover the possession of the premises, or he may have a *Scire facias* on the mortgage, or an action of debt on the bond, in which two last cases, the debt may be recovered by a sale of the premises. But there is this difference between a judgment on the *Sci. Fa.* and on the bond, that in the former, the execution is restricted to the subject mortgaged; but in the latter, any other property of the mortgagor may be levied on, or his person may be taken in execution. The mortgagee may pursue, either, or all of the remedies which I have mentioned, until he obtains satisfaction for his debt. But he cannot sell the land twice. In the case before us, therefore, the house having been sold under the judgment on the bond, the mortgagee could not make a second sale by *Levari Facias*, under a *Sci. Fa.* on the mortgage. As the plaintiff took his lease, with legal notice of a prior mortgage, it is clear, that the lease must have given way to the mortgage, had the proceeding been by way of *Scire Facias*, or ejectment. So that if the plaintiff's title now prevails, it must be, because the mortgagee lost his advantage, by the form of action which he pursued. In order to decide this question, we must consider the nature of a mortgage. It is, in substance, a security for a debt, though in form, a conveyance of land. An assignment of the debt, carries with it the benefit of the mortgage, although the mortgage be not specifically assigned. From the moment the debt is assigned, the mortgagee becomes the trustee of the assignee. So, when the mortgagor dies, without having made an assignment, his heir becomes a trustee for his executor or administrator, and if the executor or administrator make an assignment of the mortgage, the assignee takes the equitable interest therein, and may support an ejectment in his own

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name. This was expressly decided, in the lessee of *Simpson v. Ammon*, 1 Binn. 175, and it appears to me, that the principle established in that case, must govern the case before us. *Daniel Mann* had the whole interest, both in law and equity, in the mortgage given by *Berry* to *Hughes*; and having this interest, he levied on the mortgaged premises, and sold them, by means of the Sheriff. After this sale, if *Mann* retained any right to these premises, he must be considered as a trustee for the purchaser at the Sheriff's sale. Then, upon the principle of *Simpson v. Ammon*, the defendant being *cestui que trust*, might maintain an ejectment against the plaintiff in his own name, if he refused to give up the possession. But it may be objected, that after having proceeded to a sale, under a judgment on the bond, the mortgagee can have no further remedy by proceeding on the mortgage. To this I cannot assent. I mentioned before, that the mortgagee has a triple remedy, which he may pursue in a triple form, until his debt be satisfied. This is justice, this is equity. The equity of the mortgagor is, to have restitution of the land, upon payment of the debt. And the equity of the mortgagee is, to hold the land, until this debt be satisfied. Now Mrs. *M'Call* can have no better title in law, or equity, than *Berry* the mortgagor, under whom she claims; for she had full notice, (I mean legal notice,) of the mortgage. Suppose that *Mann*, (the assignor of the mortgage,) had been the purchaser, at the Sheriff's sale himself, and Mrs. *M'Call* had refused to give him possession, standing on her lease, which was prior to his judgment, what should prevent him from maintaining an ejectment on the mortgage? If the plaintiff rests her defence on the forms of law, and contends that a judgment on the bond is in no manner to be considered as a proceeding on the mortgage, she must take the consequences of that principle, and can make no defence against an ejectment on the mortgage. If she could not defend herself against *Mann*, neither could she against the defendant, who, I have shown before, stands in the place of *Mann*. That *Mann* might have supported an ejectment, will appear, by the decision of this Court, in the case of *Bantleon v. Smith*, 2 Binn. 146. There, an action of covenant was brought on a ground rent deed, judgment obtained, and the land out of which the rent issued, sold. The proceeds of sale were brought into court, and the question was, who should have them. The ground landlord, who had obtained judgment in the action of covenant, claimed them, but was opposed by creditors of the defendant, who had obtained prior judgments. The court held, that the plaintiff was entitled to the money, because his lien on the land, and his right to distrain for the rent, remained, although he had obtained judgment in an action of covenant for the same rent. And that case was compared by the court, to the case of a mortgage and bond, and it was said, that an ejectment would lie by the mortgagee, after judgment on the bond, provided the debt was not paid. I have supposed in the course of my

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argument, that *Mann* had the legal estate in him. The case is not strictly so, though for all the purposes of the argument, it may be said to be so. The legal estate was, in fact, in *Thomas Armstrong*, the first mortgagee. But the money arising from the defendant's purchase, having been applied in the first place, in satisfaction of the whole of *Armstrong's* debt, his mortgage was extinguished, and the second mortgage was the only one which held the land. But if any legal right had remained in *Armstrong* after payment of his debt, he would have held as a trustee, and been compellable in equity, to transfer the legal estate to him by whom his debt had been paid; or, which would have answered the same purpose, he might have been compelled, under our act of assembly, to enter satisfaction on record, which would have been equal to a re-conveyance. I have said enough to show, that the defendant's title to the possession, was better than that of the plaintiff. But I cannot help adding, that the execution under which the house was sold, having been applied immediately to the subject of the mortgage, the justice of the case is most effectually attained, by considering it as if the sale had been by virtue of a proceeding by *Scire facias* on the mortgage. This mode of considering it, accords best too, with an ancient practice in this state to sell the land for its full value, without regard to liens, and apply the proceeds of sale to the payment of the several liens according to their priority as was done in this case. This is undoubtedly the way by which the land may be sold to the greatest advantage, although I am sensible that it may be productive of difficult questions, with respect to lien creditors, prior to the judgment under which the land is sold. Some questions of that kind are now depending, and therefore, I desire it to be understood, that I give no opinion, how far the rights of prior creditors by mortgage, or judgment, can be affected by a sale under a subsequent judgment. My opinion upon the whole, is that the defendant was entitled to the possession, from the time he received a deed from the sheriff, and therefore, judgment should be entered in his favour.

GIBSON, J. The essential circumstances of the case are these: a creditor takes a mortgage and a bond with warrant to confess judgment. The mortgage is recorded, but judgment is not entered up, on the bond, until a year afterwards; and between the recording of the mortgage, and the entering up judgment on the bond, the mortgagor makes a lease for years. An execution issues on the judgment and the mortgaged premises are levied, condemned, and sold, no *scire facias* having been issued on the mortgage which is then due. The lease is unexpired, and the question is, whether the lessee is entitled to hold, against the purchaser, during the residue of the term.

It is argued, that the bond and mortgage being parts of the same transaction, are in contemplation of law, one instrument, and form but one security; and consequently, that the lien of the judgment

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on the bond, must relate to the date of the mortgage. Far otherwise. As to third persons, I admit that a mortgagor in possession, is to be considered the legal owner of the land: but as between the immediate parties, a mortgage is a conveyance of the legal title, leaving in the mortgagor nothing but the benefit of a condition, or a right to have the legal estate again, by paying the debt for which it was hypothecated, at or before the day assigned for that purpose; or in case of failure at the day, still leaving him in equity to redeem, by payment within a reasonable time afterwards. The mortgage, therefore, operates only on the legal estate, and it is that which is sold, where the proceeding is on the mortgage; the judgment in which, is equivalent to a decree of foreclosure, and order of sale in chancery, the mortgagor being entitled to the surplus purchase money, if any, after payment of the debt. On the other hand, a judgment on a bond, given for the same debt, operates only on the interest that was in the obligor at the time the judgment was entered; namely, his legal right to redeem at or before the day of payment, and his equity of redemption afterwards: and the obligee can, strictly speaking, sell no more. The mortgagee may, however, waive the benefit of his mortgage as a security; and where a purchaser under the judgment on the bond, is induced by his acts to believe that he does so, and pays a full price for the estate, the mortgagee will not be permitted to disturb him for the balance due on the mortgage: for in such case, a chancellor would enjoin him; and as to third persons, the purchaser standing in the place of the mortgagor, would be considered as having the legal title. With us, the practice has been universal, where the land has been pursued on the bond, to sell without any reservation of the lien of the mortgage; and the purchaser is, therefore, always considered as having acquired the legal, as well as the equitable estate. But it is clear beyond a doubt, that the mortgagee may, by express reservation, sell the interest bound by the judgment, subject to his own mortgage; and where both parties proceed on the basis of such reservation, his security will not be lessened by the sale. In this view, I, with deference, take *Jackson v. Hull*, 10 Johns. 481, to be clear and uncontrovertible law. The purchaser under a judgment on the bond, then, acquires, where the land is sold subject to the mortgage, nothing but the equity of redemption of the mortgagor, in whose place he stands: and where the lien of the mortgage is not reserved, he acquires all the interest which the mortgagor would have had at the time of the judgment, in case the mortgage had never been given. In either view, therefore, if I am correct in my premises, there is a material difference, as to the subject matter of the security of the bond, and that of the mortgage: and one which ought to preclude the purchaser from affecting an interest created on the land before the date of the judgment on which he purchased.

But there are other differences which forcibly bear on the question before us. Where bonds are given along with a mortgage,

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they are usually for separate instalments which are to fall due at different times, before the mortgage; and these are recoverable respectively, as they become due. On the other hand, the mortgage is a security for the whole debt, and cannot be put in suit, till a year and a day after the debt has become due. These securities are, therefore, as independent of each other, as the contract of the parties can make them; each being attended with consequences peculiar to itself. They cause distinct liens; the one specific, arising from the contract of the parties, and being in the nature of a pledge; the other general, arising from the judgment of a court of record, and being incidental to the contract: and these again afford different remedies, which, as the one or the other is pursued, have peculiar effects on the rights to be decided. Thus, if the mortgage is resorted to, the mortgagee may maintain an ejectment; or he may, after a year and a day from the time the mortgage became due, proceed to a sale of the land by *scire facias*; but then, in recompense of the delay, he may sell without the condemnation of an inquest. On the other hand, if he proceeds as a judgment creditor on the bond, he may instantly have execution of the mortgaged premises to the extent of the equity of redemption, of the debtor's other land, of his chattels, or of his person. Either of these courses he may pursue; and either has its advantages, and its disadvantages. But he cannot pursue a middle course, and have the advantages of both without the disadvantages of either. If, therefore, he has kept his bond in his pocket, he cannot enter it up at any time he pleases, and sell the mortgaged premises, before the mortgage is due, and at the same time, carry back the lien of the judgment to the date of the mortgage: for if he can do it after the mortgage is due, there is nothing to prevent him from doing it before. He might as well claim a right to sell without a condemnation, on the ground of giving effect in another shape, to a right secured to him under the mortgage; and this no one will pretend he could do. But even if the bond and mortgage were to be taken as one security, the consequence would be the same; for in a great variety of cases where a plaintiff has his choice of a plurality of remedies, each produces a peculiar result on the nature and the extent of the compensation recovered. In an action of debt for a penalty to secure the performance of a covenant, the amount of compensation is bounded by the extent of the penalty; whereas, in an action directly on the covenant, damages may be recovered to any amount.

On what ground then can a purchaser under the judgment, insist that its lien commenced before the judgment was rendered? Whatever may be the rights of a mortgagee, it is certain that a lease by a mortgagor in possession, is good as to a third persons; and that it can be avoided only by the mortgagee in an action of ejectment, or a *scire facias* on the mortgage. But he may if he please affirm the lease; and he does affirm it by proceeding on a judgment which is subsequent to it. That is his own concern and no one else

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has a right to interfere. He may pursue either security or both; and if he can effect a sale on the judgment for a sum sufficient to satisfy his debt, it is all he wants: if he cannot, he will of course pursue the more productive security. Now what can a judgment creditor, in that particular capacity, sell? Precisely that interest which the defendant, in his capacity of debtor by judgment, had in the land when the judgment was rendered. But here the debtor had parted with a portion of his interest, before the judgment was entered up. Suppose that, instead of making a lease for years of the whole, he had aliened a part of the land in fee: would such part be affected by the judgment and sheriff's sale; or could the purchaser under the judgment obtain possession of it, by an inquiry before two justices? Certainly not: because the creditor did not sell it, and because the alienee could safely swear, particularly since the act of the 14th of March, 1814, that he held, by title derived from the debtor, antecedently to the judgment. That would stop the proceedings before the justices, and if made out on the appeal to the Common Pleas, would of course furnish an available defence: and clearly the same may be affirmed of an estate for years.

It is however said that the purchaser acquires all the rights which the debtor had, and that chancery would therefore compel an assignment of the mortgage: so that he would, at least in equity, be entitled to the possession against the lessee or alienee. Did he stipulate for an assignment? He acquires all the rights which the creditor had, in his capacity of judgment creditor, and none beside. Chancery will order a security to be assigned in favour of a *surety* who has paid it; or if a creditor has a lien on two funds, and another creditor has a lien of a younger date, on but one of them, and the prior creditor elects to take his satisfaction out of the fund on which the younger creditor has a lien, the latter will be entitled to have him thrown upon the other fund; or to have the lien assigned to him, that he may have the benefit of all the aid it can afford. These are the only cases which I at present recollect of the assignment of securities by order of a Court of Chancery; and the difference between them and the case before us, is at once apparent. There is, here, no question of suretyship, or of liability of different funds to different creditors, but there is one fund liable to one debt, although on different securities. This doctrine of substitution is said to be founded in mere equity and benevolence. Now a creditor having two securities, either of which is sufficient to produce satisfaction, is not bound, nor ought he in conscience to proceed on the larger, and sell more than is necessary. But he proceeds on the smaller and obtains satisfaction—how can the purchaser who is supposed to know exactly what he buys, claim any thing beyond what the creditor professed to sell? Suppose the case of an unrecorded mortgage which would nevertheless be good against the mortgagor and those claiming under him: the purchaser under the judgment being

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ignorant of its existence, could not have contemplated having the benefit of it when he purchased; yet he would obtain it by the principle insisted on. The presumption is, that if the estate of the debtor had been sold to the extent of the larger security, the purchaser would have had to pay more for it; and thus there would have been a surplus remaining to the debtor; to the benefit of which the purchaser would be entitled on no principle of equity or conscience. This consideration is of substantial importance to the debtor; and chancery in compelling an assignment of the mortgage would take from him what is clearly his property; and in favour of a person who had not paid a farthing for it. The purchaser therefore has no colour of equity. A mortgagee has an interest in the land only to the amount of his debt, and when that is satisfied his interest ceases. If he has a distinct security of less extent, he can sell in pursuance of it, only what it covers. If he means to sell more, he ought in fairness to the debtor, to sell on the larger security, so that bidders may know what they buy and regulate their bidding accordingly. I therefore can discover no equity, by which a purchaser under the smaller security is entitled to say he obtained an interest in what there is no reason to suppose the creditor intended to sell.

It will be perceived that I have treated this last question as if the proceeds of the sale had satisfied the mortgage. It however appears that the fact is not so; but this circumstance will produce no difference in the result, because even conceding that the sale was not subject to the mortgage, that would preclude the mortgagee from affecting only the interest which passed by the sale and the sheriff's deed, but not from affecting the interest of the mortgagor or those claiming under him.

It must be obvious that the question ought not to be affected by any consideration arising out of the payment of the purchase money. No one will pretend that proceeding against the land on the bond releases it from the lien of the mortgage; which is amply sufficient for the protection of the mortgagee: for if it did, that would very fairly dispose of the purchaser's claim to an interest under the mortgage. But the purchase money although collected on the bond will be paid on the mortgage as an existing lien, where it happens to be the oldest, just as if the bond and mortgage had been for distinct debts due to different persons.

With respect to the argument that the rent, although payable in advance, had not been actually paid at the time of the sale, and that Mrs. *M'Call* might therefore have rescinded her lease, it is sufficient to observe that the lease may have been a valuable one, and she was not bound to give up the bargain because she had not actually executed her part of the contract. But at all events if she had in other respects, a vested interest, her landlord was not bound to accept of a surrender, and his interest is to be taken into consideration as well as hers.

The whole will, I think, be found to rest on this principle. The

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purchaser is supposed to buy the debtor's interest in the land, and not any security which was a lien on it; and on this ground I am of opinion that Major *Lenox* was not entitled to possession from the date of the sheriff's deed, but that Mrs. *M'Call* was entitled to hold for the residue of her term.

DUNCAN, J. This comes before the court as a special verdict, on which it is agreed judgment shall be entered, as the court decide the right of possession in *November*, 1815, when Major *Lenox* obtained his sheriff's deed. The validity of the lease of Mrs. *M'Call*, on account of its commencement *in futuro*, is not questioned, though certainly, open to animadversion, on the dangers arising from such a lease, with all the rent paid in advance; and if it embraced any period beyond three years from the time of its execution, not being recorded, I would very much doubt, whether it could prevail against a subsequent purchaser or mortgagee without actual notice.

This question which now calls for our judgment, is one of general importance, and without any particular detail of dates is, whether a purchaser of lands, sold on a judgment entered on a bond subsequent to the execution of a mortgage, to secure its payment, shall prevail against a lessee of the same lands, who has obtained a lease mesne between the execution of the mortgage and entry of the judgment, where the sale is made for the fee simple value of the lands, and the money applied to the discharge of that mortgage and a prior mortgage.

What is the mortgage? It is a pledge, and more, for it is an absolute pledge, to become an absolute interest, if not redeemed at a certain time. The possession of the mortgagor is the possession of the mortgagee, and as to the inheritance they have but one title between them. The mortgagor has no power of making leases to bind the mortgagee. He cannot, against the will of the mortgagee, do any act to dispossess him. *Cro. Jac.* 660. *Cro. Car.* 304. 3 *Lev.* 388. and *Skinner*, 424. And the reason is, because in the eye of the law, so long as he receives his interest, he is virtually in possession. When the day of payment is past, in *England* the mortgagee has the right to the actual possession whenever he pleases: in this state, one year after the last day of payment. He may bring his ejectment at any moment that he will; he is entitled to the estate with all crops growing: he is also entitled to the rents which have become due since the mortgage. And where the lease is given after the mortgage, he may bring ejectment against the tenant without notice to quit, upon the ground of the lessee being subject to every circumstance of the mortgage, and of the mortgagee's right of possession. He may, by assenting to the lease, create a tenancy from year to year, the lease being considered only as evidence of the quantum of rent. *Brad. on Distresses*, 97. It is proposed to consider, whether the purchaser does not on this sale, hold all the interest which the mortgagor had on the land, at the time

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of the execution of the mortgage; or whether he is a purchaser of the equity of redemption only, taking the estate subject to all the intervening incumbrances: and again to consider, whether he is not virtually the holder of all these incumbrances, which he has satisfied by the payment of the consideration money to the mortgagees.

In *England* the equity of redemption is not extendable on an execution. The course there is, to levy the execution on the land, and then apply to the chancellor for a decree of redemption, claiming the same satisfaction out of the equitable interest as he would have at law if it were legal. This done, he may then bring the lien by his judgment to bear upon it as the legal estate. 2 *Atk.* 290. 3 *Atk.* 200. 2 *Fonbl.* 168. 1 *Pow. Mort.* (by *Coventry*) 257.

But where the sale is on a judgment on the entire bond for which the mortgage was given, it would appear to me, that the entire estate of the inheritance was the subject of sale. This I think will appear very evident from a consideration of the nature of the security by mortgage. A mortgage is a charge upon the land. Whatever will give the money, will carry the estate in the land along with it. The estate in the land is the same thing, as the money due upon it. It goes to executors, will pass by a will not executed according to the statute of frauds. The assignment of the debt or forgiving it will draw the land after it, as a consequence. It would do it, though the debt were only given by parol. *Weston's Lessee v. Mowlin*, 2 *Burr.* 969. A mortgage, though in form a conveyance of the land, is in substance but a security for the payment of the money, and the debt being paid, or in any other manner extinguished, the mortgagee becomes a trustee for the mortgagor. *Wentz v. Dehaven*, 1 *Serg. & Rawle*, 367. The debt is the principal, and the land the accessory. In *Johnson v. Hall*, 3 *Johns. Cas.* 329, KENT, Justice said, "when the note to secure which the mortgage was given, was negotiated, the interest in the mortgage, which was given for no other purpose than to secure that note, passed of course. It required no writing, no assignment on the back of the mortgage. The assignment of the note applied equally to the note and the pledge. The one was but appurtenant to the other. Whoever was owner of the debt, was likewise owner of the security. There must be something peculiar in this case, some very special provision of the parties to induce the court to separate the ownership of the note from the ownership of the mortgage. In the eye of common sense, and of justice, they will generally be united." Following this decision into the court of error, 1 *Johns. Rep.* 590, we find it to be unanimously affirmed. SPENCER, Justice, who delivered the opinion of the court, observed, "that where a debt secured by mortgage, is transferred by the mortgagee, he becomes trustee for the benefit of the person having an interest in the debt." Now *David Lenox*, having paid off these mortgages became the owner of the debt, and being the owner of the debt, he became the owner of the securities for the debt. The mortgagees

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held the mortgages in trust for him. In *Runyan v. Mersereau*, 11 Johns. 538, the same doctrine is held. Mortgages are but securities in equity. The assignment of the debt or forgiving it by parol draws the land after it as a consequence. The debt is considered the principal, the land as an incident only. In equity the debt is the principal. The translation of the interest therein, necessarily draws after it the interest of the land in equity. By the assignment of the debt, the interest of the land becomes transferred in equity, through the medium and circuitry of a trust, without any writing, by operation of law, notwithstanding the statute of frauds. The transaction is regarded as nothing else in substance, but a debt to which all the securities are merely accidental adjuncts, and which have no existence but by their union with the subject to which they are attached. *The equity of redemption is therefore not a mere trust, but in equity is the veritable estate.* *Roberts on Frauds*, 272 to 276. The author proceeds in 277, "the mortgage is not a conveyance of land, *qua* land which passes, but a pledge or security in all respects, subservient to a personalty incapable of existing in separation from it, existing only for the sake of it, and for no other purpose." Thus we see the inseparable union of the bond and the mortgage: the bond (the debt,) the principal, the mortgage, but an incident, an accessory, an adjunct to it, an appurtenance to the mortgage, incapable of existence without a union with the debt. How comes it then, that a judgment for the principal, the debt, a sale for the debt, a payment of the debt, separates them; that this does not, as a consequence, draw the land with it. I cannot understand why when the land is sold, under process of law, for the payment of the debt, the purchaser should not acquire with that the incident, as much as if he had obtained an assignment of the debt. I can understand this when it is sold on a judgment for another debt. That is but an equity of redemption, the residue of the mortgagor's estate in the premises. But when it is sold for the very debt secured by the mortgage, I cannot contemplate them as distinct substances. In equity, the equity of redemption is the veritable estate, the united estates of the mortgagor and the mortgagee: the debt an entire one, the security entire; the debt the principal, the security but an adjunct, an accessory which always follows the principal, as the shadow follows the substance. I do not understand the *New York* decision, *Jackson v. Hall*, 11 Johns. 462, as laying down a general principle, that where the mortgaged premises are sold on the judgment obtained on the bond, the mortgagee can sell them again, on the mortgage. Far from it. The court lay hold of the strict, rigid, antiquated notions of the absolute right of the mortgagee after default, to get rid of the very iniquitous pretence of a purchaser who bought only the residue of interest remaining in the mortgagor after executing the mortgage. He purchased for 70 dollars, that which had been mortgaged for 700 dollars. The court said, this was most unjust, both to mort-

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gagor and mortgagee; and in such case, where positive evidence, or the *evidentia rei*, the purchase money, demonstrated that a sale only of the equity of redemption was made understandingly by all, I would agree to this decision, on this principle. But where the evidence showed it was the fee simple, the fee simple should pass. That was the case here. The purchaser is entitled to the whole fund appropriated to secure the debt. The sale on the judgment on the bond, where it is a general one without exception or reservation, is coextensive with the whole lien on the land, and from the indissoluble union of the debt and of the mortgage, it necessarily follows, that it is a cession of the united title of the mortgagor and mortgagee at the time of the execution of the mortgage. When the mortgaged premises were levied on by the *feri facias*, it was an election by the mortgagor to proceed *in rem*, against the pledge, and the sale on the *venditioni* was as much a sale of the pledge out and out, as if it had been made on a *levari facias*.

It is no objection with me, that the party has elected his remedy. It is not a case of election of alternate remedies. The remedies are cumulative, concurrent; may be all carried on together though there can be but one satisfaction. In *England* the mortgagee has three remedies, action of debt on the bond, ejectment, and bill in equity to foreclose. Here he likewise has three, debt on the bond, ejectment, and *scire facias* on the mortgage, all provided at the same time, if he so choose.

The question, whether on a sale by a junior incumbrancer which is more than sufficient to satisfy the prior mortgage, the mortgagee is not bound to look to the sheriff, is a vexed question, on which I give no opinion. But where he assents to the sale and receives the money, as he unquestionably may do, that the purchaser holds something more than the mere equity of redemption, cannot be denied. It is a usage universal in *Pennsylvania*. The sheriff has a list of the judgments and of the mortgages, and discharges them in their order, and if the sale amount to a sufficient sum to discharge all, down to the incumbrance on which the sale has been made, and all are discharged, no one ever doubted, but that the purchaser held the fee simple. Now this very thing, has been done here. This is not peculiar to this state. In *South Carolina* the law is the same, 1 *Bay*, 36, and 2 *Bay* 82., where the land has been sold under an execution on a subsequent judgment, the mortgagee may elect to foreclose, and go against the land, or sue for the money arising from the sale.

But this question has been long since settled in this court in *Bantleon v. Smith*, 2 *Binney*, 146. A ground rent conveyance is but a security for rent, not more absolute than a mortgage. Yet where the proprietor of a ground rent obtained a judgment in covenant for arrears of rent, and sold the land, it was decided, that he was entitled to be paid out of the proceeds the whole of the rent in arrear, as well such as accrued before the judgment as after.

(M'Call v. Lenox.)

And the CHIEF JUSTICE compared it to the common case of mortgage and bond, and said it never had been doubted, but that the mortgagee after judgment on the bond might proceed by ejectment. But it has been carried one step further: that even the assignee of the administrator of a mortgagee might maintain an ejectment in his own name. 1 *Binn.* 175. The administrator then, could himself, in his own name support ejectment, and why? Because he was the master of the debt, and being master of the debt, could use the mortgage, as an instrument to enforce payment.

Boni judicis est ampliare jurisdictionem, is a maxim we have been obliged to resort to, in the exercise of chancery powers in granting equitable relief. The system is progressive, and as new cases in equity are daily arising, we must accommodate our common law means to meet new cases, and although we do not directly grant chancery relief, yet, by another medium, we attain the same end, more circuitously, certainly, but not less effectually. We arrive at the same point, though by different roads. The relief is ultimately the same, though the mode of administering it be different. Now, if we apply and exercise the powers of chancery here, we would decree *Mann* and *Armstrong* to assign the mortgage to *Lenox*, in which case he could recover the possession from Mrs. *M'Call*. We cannot do that; but we can accomplish the same end by that which is a solid foundation of our chancery jurisdiction, by supposing that to have been done, which chancery would decree. This is the basis of all equitable ejectment, which forms a very distinguished feature in our jurisprudence, and which considering as a bill in equity, a party entitled to an interest in land, which could only be come at in a court of equity, can recover the land itself, with such conditions as will compel his opponent to do him justice. If Major *Lenox* was in possession, Mrs. *M'Call* could not recover in ejectment unless she tendered the principal and interest of the incumbrances antecedent to her lease. If he could defend in ejectment on that ground, there are abundance of decisions which show, he might recover. To enforce the payment of a lien, a charge on land, ejectment will lie. *Galbraith v. Fenton*, 3 *Serg. & Rawle*, 352. Wherever a defendant could defend his possession on an equitable claim, a plaintiff could recover possession on the same equity. So, where a plaintiff, on an equitable title, could support ejectment, defendant in such right could defend his possession, against the legal title. And if a plaintiff in ejectment is bound in equity to make title to the defendant, for part of the premises, the court will compel him to do the defendant justice, by staying execution on the judgment, till the title to the part is secured to him. *Mather's Lessee v. Arkwright*, 2 *Binn.* 93. The experience of every day must convince us, of the necessity of the liberal exercise of chancery powers, without which, we should not deserve the name of a court of justice.

Hence it is, that as in equity, *D. Lenox* would be entitled to

(M'Call v. Lenox)

call on the legal estate to protect him, having paid the full consideration money of these mortgages to the mortgagees, I consider him as the actual owner, for every beneficial purpose, of them, and as such entitled to the possession. He is then clothed with the legal title, and Mrs. *M'Call* has no superior title in equity, for her interest was acquired with full notice of the prior right, notice by the registry; and she took her lease subject to the elder title of the mortgagees. That this may be well understood, I consider the law of *Pennsylvania* to stand thus, that on a sale of lands on a judgment on bond, secured by mortgage, by the sheriff, though that judgment is posterior to the execution of the mortgage, the purchaser acquires all the title of the mortgagee, and will hold against all subsequent incumbrances of whatever nature, mortgages or judgments, and this, I am of opinion, has been the long and well established, and understood rule. In *Bantleon v. Smith*, 2 *Binn.* 146, is the doctrine recognized, not then first determined. There the proprietor of a ground rent in fee, who obtained a judgment in covenant, for the arrears, and on that judgment sold the land, was entitled to be paid the whole rent in arrear out of the proceeds, in preference to older judgments. It had been before so settled by President *BIDDLE*. I except from this general doctrine, the case of several bonds, given to the same person, secured by the same mortgage, particularly where the bonds are not all held by the same hand, and confine it to a mortgage given for one entire debt, and for which entire debt, judgment has been rendered, and the premises sold. I deny the right of the mortgagee to proceed either by *scire facias*, or ejectment, to disturb such purchaser at sheriff's sale, and contend, that it is not the equity of redemption that is sold, but all the title of the mortgagor at the time of the execution of the mortgage. Unless indeed, that which is very improbable should ever occur, the sale was made expressly of the equity of redemption, and nothing more, evidenced by the amount of the sale compared with the value of the inheritance: and that was the case so much insisted on by the counsel for Mrs. *M'Call*, decided in the Supreme Court of *New-York*, 10 *Johns.* 481. But so far from that case laying down any general principle, the reason and grounds of that decision, the general *dictum* of the court is referrible only to the ancient doctrine of mortgages, and the court decide it on that rigid principle, that only the equity of redemption was sold, only the residue of interest remaining in the mortgagor, after the execution of his mortgage, proved by the purchase money, which was only 70 dollars, though it had been mortgaged to secure 700 dollars. But here the purchase money was the full value of the fee simple estate.

It appears to me, for all these reasons, that *David Lenox*, according to the terms of the agreement, is entitled to judgment.

Judgment affirmed.

[PHILADELPHIA, APRIL 11, 1823.]

In the Case of JOHN GEST, a Lunatic.

IN ERROR.

No writ of error lies on an inquest, finding a person to be a lunatic, returned to the Court of Common Pleas.

JOHN GEST, was found to be a lunatic, by an inquest held by order of the Court of Common Pleas of *Chester* County, upon which a writ of error issued from this court.

Dillingham moved to quash the writ of error.

The court called on *Edwards* and *Tilghman* to support the writ, who cited *Queen v. Paty*, *Salk* 504, that a writ of error is grantable *ex debito justitiæ*, except only in treason or felony. In *The Commonwealth v. The Judges of the Common Pleas of Philadelphia County*, 3 *Binn.* 273, and *Beale v. Dougherty*, *Ib.* 432, it was held, that a writ of error lies on the order of the Court of Common Pleas, dismissing an appeal from the judgment of an alderman. *Blackstone*, in his *Commentaries*, Vol. 3, p. 427, is in point. The previous proceedings, says he, on the commission to inquire whether or not the party be an idiot or lunatic, are on the law side of the Court of Chancery, and can only be redressed if erroneous, by writ of error in the regular course of law.

Dillingham and *Hemphill*, contra. The writ of error from the Court of Chancery, is explained in 3 *Bl. Com.* 48, to be from the ordinary court, to the Court of King's Bench: but he there states, that he has met with no traces of any writ of error being actually brought since the fourteenth year of Queen *Elizabeth*, A. D. 1572. And in *Rex v. Carey*, where the cases referred to by *Blackstone*, were cited on a motion in chancery, for liberty to bring a writ of error in the King's Bench, the lord keeper, *North*, said, all those books were founded only on the single opinion of my Lord *Dyer*, and that he thought the jurisdiction of Chancery, even of the *Latin* side, not subjected unto, nor to be controlled by the King's Bench: and that he would enjoin all such writs of error. The proper remedy for any error committed, is by appeal to the king in council, and not in the ordinary course attending the established jurisdiction of the kingdom. 2 *Madd. Ch.* 567, *Sheldon v. Fettescue*, 3 *P. Wms.* 104. 4 *Bro. C. C.* 238, note. There are many cases in this state, in which no writ of error lies to this court, from the decisions of inferior tribunals, 2 *Yeates*, 162. None lies in case of a divorce, *Miller v. Miller*, 3 *Binn.* 30: nor in road cases, *Ruhlman v. The Commonwealth*, 5 *Binn.* 24: or where the court below is to exercise its discretion *Renninger v. Thompson*, 6 *Serg. & Rawle*, 1. No such power is given by the act of assembly, of the 22d May, 1722, *Purd. Dig.* 310, or is deducible from ge-

(In the case of John Gest, a Lunatic.)

neral principles. The power of a Court of Chancery, so far as relates to the care of the persons and estates of those who are *non compotes mentis*, is given by the constitution, to the Supreme Court, and the several Courts of Common Pleas, in the same language, and no superintendence of the one or the other is recognized.

The court quashed the writ of error.

[PHILADELPHIA, APRIL 25, 1823.]

HARRISON *against* WALN and another.

The court will not, on motion to set aside a *Fi. Fa.*, inquire into the title of a third person, who claims the lands levied on, but will leave him to his ejectment.

Nor will the court, in such case, inquire into the existence of a lien on the land; though they would apply the proceeds to them if valid, when the money is brought into court by the sheriff.

If a subsequent judgment creditor buy in a prior mortgage and judgment, and under the latter, levy on lands of the debtor, not included in the mortgage, with a view to the payment of his own judgment out of the mortgaged property, the court will not interfere, on motion, to relieve one claiming the land levied on, under a voluntary conveyance, by directing the debtor to proceed against the mortgaged premises: though, it seems, they would in favour of a purchaser for a valuable consideration.

Fieri Facias to March Term, 1823, for the use of *Daniel Smith* and *David Lewis*.

This case was argued by *C. J. Ingersoll*, and *J. Sergeant*, for the defendant: and,

J. S. Smith and *Binney*, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This is a motion to set aside the execution, which was issued for the use of *Daniel Smith* and others, assignees of *George Harrison*, who had entered judgment on a bond with warrant of attorney, &c., from said *Sarah* and *William Waln*. Mr. *Harrison's* debt was secured also by a mortgage from *Sarah Waln*, bearing the same date as the bond, viz: the 15th November, 1818, on two houses and lots in Second Street. The assignees of the judgment paid full value for it, and received an assignment both of the judgment and mortgage; and they laid their execution, not on the mortgaged property, but on a house and store in Market Street, and also on several tracts of land near *Frankfort*, in the county of *Philadelphia*, claimed, in part by *Jacob*, and in part by *Nicholas Waln*, sons of *Nicholas Waln* the elder, deceased, and of his widow, *Sarah Waln*, one of the defendants. The motion to set aside the execution, was made on behalf of the said *Jacob* and *Nicholas Waln*, and their counsel have rested it on different grounds, which shall be considered distinctly, as I think the case

(Harrison v. Waln and another.)

has been somewhat perplexed, by blending matters which ought to be kept separate.

1st. In the first place, it was said, that part of this property belonged, in equity, to *Jacob*, and part to *Nicholas Waln*, having been held in trust for them by their father, *Nicholas*, who devised it to their mother, *Sarah*, the defendant. All claim of this kind, is to be thrown out of the question; because if *Jacob* and *Nicholas Waln* have an equitable title, they may maintain it in ejectment, and there can be no occasion for the summary interposition of this court. The sheriff can sell no more than the title of *Sarah Waln*, such as it is, and if *Jacob* and *Nicholas* have an equity, and due notice is given at the time of sale, the purchaser must take it subject to that equity. It is the rule of this court, not to interfere with executions, regularly issued, but in case of necessity, and where land is sold by the sheriff, as the property of the defendant, which is claimed by a third person, (a very common case,) the parties are left to contest the title in an ejectment.

2d. But *Jacob* and *Nicholas Waln* rely likewise, on the equity of their case, independently of any title, legal or equitable, vested in them in the life of their father. I will state the circumstances of the case. *Nicholas Waln* the elder, devised his estate, of which the property in question was part, to his wife *Sarah* in fee. *Sarah Waln* having made herself responsible for large sums, due to sundry persons, from her son *William*, her friends became alarmed for her situation, as well on her own account, as that of her other sons *Jacob* and *Nicholas*, and advised her to make some provision for those sons, provided it could be done, consistently with the principles of justice. In order to ascertain this, they made an estimate of her property, and her debts, by which it appeared, that her property amounted to 119,000 dollars, and her debts to about 78,000 dollars. Supposing, therefore, that the thing might be done with the strictest propriety, *Sarah Waln*, by the advice of her nephew, *Thomas Wistar*, and her friend *Thomas Stewartson*, both men of undoubted integrity, executed conveyances of the lands and real estate, on which this execution was laid, to her sons, *Jacob* and *Nicholas Waln*, in severalty, bearing date the 3d June, 1819, posterior to the plaintiff's judgment, which was entered the 5th May, 1819. A negotiation afterwards took place between the *Bank of North America* and Mrs. *Waln*, and between her and the *Phœnix Insurance Company*, to both which, Messrs. *Wistar* and *Stewartson* were privy; and they say, that the directors of these corporations were informed of the conveyances which Mrs. *Waln* had made to *Nicholas* and *Jacob Waln*. On the 13th November, 1819, Mrs. *Waln* gave her bond and warrant, &c. to the *Bank of North America*, for 40,200 dollars, and on the same day, she gave her bond and warrant to the *Phœnix Insurance Company*, for 17,000 dollars, judgments were entered on both these bonds a few days after their date. The bond to the *Bank of North*

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America, was for sundry debts of *William Waln*, for which Mrs. *Waln* had made herself responsible, and the bond to the *Phœnix Insurance Company* was for a debt of *William Waln's*, for which his brother *Nicholas* had become responsible, and which was assumed by Mrs. *Waln*, it being understood that *Nicholas* should be discharged. Previous to the execution of these bonds, *Nicholas Waln* had reconveyed to his mother, the real estate which she had before conveyed to him. The deed of re-conveyance bears date the 22d July, 1819, and was recorded the same day. The avowed object of this re-conveyance was, to prevent the *Phœnix Insurance Company*, from obtaining a lien on the property of *Nicholas* by a judgment, which was expected to be soon entered in a suit then depending.

On the 5th November, 1819, Mrs. *Waln* executed a deed by which she conveyed to *Thomas Wistar* and *Thomas Stewartson*, (without their knowledge) the real estate which had been re-conveyed to her by her son *Nicholas*, as before mentioned, in trust for *Nicholas* and his heirs, but by an agreement between Mrs. *Waln* and *Nicholas*, she was to enjoy the rents and profits for her life. Contrary to the expectation of Messrs. *Wistar* and *Stewartson*, the estate of Mrs. *Waln* was unequal to the payment of her debts. She afterwards, on the 18th March, 1822, executed an assignment of all her property of every kind, to *Henry Nixon* and others, in trust, to sell the same and apply the proceeds to the payment of her debts, giving a preference to the judgments of the *Bank of North America*, and the *Phœnix Insurance Company*. Sometime after this assignment, the *Bank of North America* settled on Mrs. *Waln*, an annuity of 800 dollars per annum for life, and the *Phœnix Insurance Company* settled on her an annuity of 340 dollars per annum for life. These corporations are the real plaintiffs in this execution, and they levied, not on the mortgaged property, but on the property conveyed by Mrs. *Waln*, to her sons *Jacob* and *Nicholas*, which was bound by *George Harrison's* judgment, in order that they might afterwards levy on the mortgaged property by virtue of their own judgments, or that *Henry Nixon* and others (the general assignees of Mrs. *Waln*) might sell the property and apply it to the payment of these judgments. It was contended by the counsel for *Jacob* and *Nicholas Waln*, that the execution in this case should have been laid on the mortgaged property, and that the plaintiffs ought not to be permitted, in this indirect manner, to defeat the conveyance made by Mrs. *Waln*, of which they had notice before she gave her bonds to them. On the other hand, the plaintiffs say, that having acquired a legal advantage, by the purchase of *George Harrison's* judgment, the court ought not to prevent them from making the most of that advantage, for the purpose of receiving their just debts. If *Jacob* and *Nicholas Waln*, were purchasers for a valuable consideration, there would be strong ground for the interference of the court.

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In such case there would be great reason for restraining the execution of the plaintiffs, in the first instance, to the mortgaged property, which should be exhausted before they were suffered to touch the property of purchasers. But this case is otherwise. *Jacob and Nicholas Waln* received a *voluntary* conveyance from their mother, which cannot stand against her creditors. But, it is objected, that the plaintiffs knew of these conveyances and assented to them. It appears that they did know of them. But that they *assented*, so as to preclude their ever after calling them in question, has not been made out by any means to our satisfaction. They gave no writing, evidencing any kind of assent, or confirmation. Nor is it alleged, by the witnesses, that any confirmation was made, by positive parol agreement. From the circumstance of the existence of the conveyances being communicated to the plaintiffs, and no objection being made by them, their assent has been inferred. Now how stands the equity of the case? It was taken for granted by Mrs. *Waln* and her friends, who advised her to make the conveyances to her sons, that there would be a considerable surplus of her estate, after paying all debts. The character of all the parties forbids any idea of an intent to provide for the children, at the expense of creditors. When Messrs. *Stewartson* and *Wistar* communicated to the plaintiffs the situation of Mrs. *Waln's* affairs, no doubt the plaintiffs were induced to believe, that they should receive full payment of their debts. Now it turns out, that there was a great mistake, in that important particular. The debts will not be paid, if the conveyance stand good against the creditors. What equity then have the children against the creditors? The plaintiffs ask nothing of the court. They have the law on their side. But the children call for the interference of the court, because the proceedings of the plaintiffs are against equity. Under the circumstances of this case, would chancery compel the plaintiffs to relinquish their legal rights? I cannot think it would. The plaintiffs have given no writing, have done no act, confirming the conveyances to *Jacob* and *Nicholas Waln*. And as to any implied assent, under a supposition that their debts would be paid, its force is very much impaired by the actual event, which has shown that the debts cannot be paid without resorting to the funds in the hands of the children. I desire it to be understood, that I give no opinion on any title which *Jacob* or *Nicholas Waln*, may have, paramount to the title derived from their mother, nor on any right which they may have to resort to their father's estate, for debts due to them from him. There are appearances of hardship, in their case, but the whole is not sufficiently disclosed, to authorise the court, to express an opinion. If debts are due from the estate of *Nicholas Waln*, deceased, and those debts still retain their lien on the real property, the court would have a right to apply the proceeds of the sale, to the discharge of the lien, when the money shall be brought in by the sheriff. But that is no reason for setting

(Harrison v. Wain and others.)

aside this question. All that is now to be considered, is, whether the proceedings of the plaintiffs have been shown to be so much against equity, that the court should arrest the execution. I am of opinion that this has not been shown, and therefore the motion should be rejected.

Motion rejected.

[PHILADELPHIA, April, 12, 1823.]

LYLE and others *against* RICHARDS.

CASE STATED.

J. H. the elder, being seised in fee, devised lands to his nephew W. H. for life, without impeachment of waste, and after his decease, to the first son of his body for and during his natural life, without impeachment of waste, and after his decease, to the heirs male of his body lawfully begotten, that is to say, the first, second, third, fourth, and every other son and sons successively of said first son, as they shall be in seniority of age and priority of birth, and to the heirs male of the body lawfully begotten of such first, &c., son and sons respectively; and in default of such issue, to the second son of said W. H. for and during his natural life, &c. and after his decease to the heirs male of the body of such second son lawfully begotten, that is to say, &c. (as before with the first,) and in default of such issue to the third, fourth, fifth, and every other son and sons successively of the body of said W. H. one after another, according as they shall be in seniority of age and priority of birth, for their natural lives, &c., and after their deaths, &c. (as before with the first and second.) And for default of such issue to his nephew A. H. for life, &c. without impeachment of waste, and after his decease to the first son of his body, &c. exactly as it had been to the issue of W. H. and for default of all such issue male as aforesaid to the heirs of the body of the said W. H., and for default of such heirs, then to the heirs of the body of the said A. H., and after other remainders over, remainder to the right heirs of the testator. The will was dated 4th March, 1776, and the testator died in the year 1783, at which time his nephews W. H. and A. H. were both living, and also the said A. H., first son J. and second son A. A. H. died before his brother W. H., leaving issue two sons, J. and A., and four daughters. W. H. died without issue. After his death, J. son of A. H., conveyed the land by deed of bargain and sale, to T. P. in fee. To this deed A. was a party, and it was declared to be to make T. P. tenant to the process in a common recovery, which to be suffered for the purpose of vesting the fee simple in J. H., was accordingly suffered in the Supreme Court, at March Term, 1803, with treble voucher, the said T. P., J., and A., being severally vouched,

Held, that J. was seised of an estate for life in possession, with contingent remainder to his sons successively in tail male, and that A. had an estate for life vested in interest, with contingent remainders to his sons successively in tail male, after which a remainder in tail general was vested in J., with remainder in fee simple, vested in J. and A. and their sisters; that the recovery was well suffered, and J. by it became seised of an estate in fee simple in possession.

The common law doctrine of forfeiture, for the purpose of barring contingent remainders, has been extended to *Pennsylvania*.

COVENANT by James Lyle, Joseph R. Ingersoll, Edward Ellice, and Thomas B. Barclay, assignees of Francis L. O'Bierne and Rebecca, his wife, James Lyle, John B. Newman and William H. Tod, assignees of Henry Beckett and Mary, his wife. Joseph

(Lyle and others v. Richards.)

R. Ingersoll and *William Rawle, Jr.* assignees of *Hartman Kuhn* and *Ellen*, his wife, and *Andrew Hamilton*, *Margaret Hamilton* and *Mary Hamilton*, the said *Andrew* in his own right, and together with the said *Margaret*, *Mary*, *Rebecca O'Beirne*, *Mary Beckett*, and *Ellen Kuhn*, being heirs and assignees of *James Hamilton*, deceased, plaintiffs, against *Samuel Richards*, defendant, in which the following case was stated for the opinion of the court.

James Hamilton, Esq., the elder, formerly of *Bush Hill*, in the county of *Philadelphia*, being seised in fee, of the estate on which he lived, made his last will and testament, dated the 4th March, 1776, with codicils thereto, subsequent in date, by which he devised the estate, called *Bush Hill*, containing about 153 acres, and 148 perches of land, together with a city square of ground, to his nephew, *William Hamilton*, for life, with remainders to the children of his nephew, *Andrew Hamilton*, as follows:

To his nephew *William Hamilton*, second son of his brother, deceased, *Bush Hill*, &c., containing 154 acres, and other property, for life, without impeachment of waste; and after his decease, to the first son of his body, lawfully begotten, for and during his natural life, without impeachment of waste; and after his decease, to the heirs male of the body of such first son, lawfully begotten, that is to say, the first, second, third, fourth, and every other son and sons successively of the first son of the said *William Hamilton*, lawfully begotten, as they shall be in seniority of age and priority of birth, and to the heirs male of the body, lawfully begotten, of such first, second, third, fourth, and every other son and sons respectively; and in default of such issue, to the second son of the body of *William Hamilton*, for and during his natural life, &c. and after his decease, to the heirs male of the body of such second son, lawfully begotten, that is to say, &c., as before with the first: and in default of such issue to the third, fourth, fifth, and every other son and sons successively, of the body of the said *William Hamilton*, one after another, according as they shall be in seniority of age, and priority of birth, for their natural lives, &c. and after their deaths, &c., as before with the first and second. And for default of such issue, to his nephew *Andrew Hamilton*, for life, without impeachment of waste, and after his decease, to the first son of his body, &c. exactly as it had been to the issue successively of *William Hamilton*. And for default of all such issue male as aforesaid, to the heirs of the body of the said *William Hamilton*, and for default of such heirs, then to the heirs of the body of the said *Andrew Hamilton*. And for default of such heirs, then to his nephew *John Allen*, for and during his natural life, &c., and after his decease, to the first, second, third, and all and every other son and sons of the body of the said *John Allen*, and to the heirs male of their several and respective bodies, the one after the other, &c., the elder being always preferred to the

(Lyle and others v. Richards.)

younger. And in default of such issue, to his nephew *Andrew Allen*, for life, &c., and after his decease, to the heirs male of his body, lawfully begotten; and in default of such heirs male to my nephew *James Allen*, for life and after his decease, to the heirs male of his body, lawfully begotten. And for default of such heirs male, then to his nephew *William Allen, Jr.*, and to the heirs of his body, lawfully begotten, for ever. And in default of all such issue, then to his own right heirs for ever.

Provided, that if any such heirs of the body of any such person shall happen to be two or more females, then the first or eldest of such two or more females, shall take the premises as special heir, and she only and solely; and the heirs of her body lawfully begotten, shall have and enjoy the whole of the devised premises to herself alone, and to the heirs of her body, without partition or division. And on failure of such issue of the first or eldest of such females, then the same shall succeed and remain whole and entire, without partition or division to the second, or next eldest of such two or more females, and to the heirs of her body, lawfully begotten, and so from time to time, in like manner, as often as that case shall happen.

And he empowered every person who should at any time be in possession of the lands, &c., to do all acts, &c., for granting out for any estates however large, of any of the *Lancaster* lots, reserving ground rents. And with regard to *Bush Hill*, authorized any person in possession, to grant on building leases, not exceeding sixty-five years.

He devised an estate in *Hunterdon, New-Jersey*, to *James Hamilton*, for his more liberal maintenance and education, in fee: that in case of his death under age, then to the second and every other sons of *Andrew Hamilton*, in succession. And if none of them attain 21 years of age, then to *William Hamilton* in fee.

William Hamilton was appointed residuary legatee and devisee; and *William Hamilton*, *Andrew Allen*, and *John Allen*, were nominated executors.

The said *James Hamilton*, in the year 1783, died unmarried, without issue, seised of the estate in question.

William Hamilton the devisee in the said will mentioned, entered into the premises and died seised thereof, in the year 1813, unmarried, and without issue. *Andrew Hamilton* in the said will mentioned, died before *William*. The children of *Andrew Hamilton* then living, consisted of the following: first, *James Hamilton*, the eldest son, *Andrew Hamilton*, the second son, born November 4th, 1776, *Margaret Hamilton*, the eldest daughter, *Mary Hamilton*, the second daughter: *Ann Lyle*, another daughter of *Andrew Hamilton*, was dead, leaving *Rebecca O'Beirne*, *Mary Beckett*, and *Ellen Kuhn*. After the death of the said *William Hamilton*, *James Hamilton*, above named, the eldest son of *Andrew Hamilton*, the same *Andrew* that is mentioned in the

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will of *James Hamilton*, the elder and above named, entered on the premises under the will of his grand uncle, *James*, and continued seised of the same until the common recovery and conveyance hereafter mentioned. *James* and *Andrew Hamilton*, at the time of the suffering of the common recovery hereafter mentioned were unmarried, and without issue.

On the 5th day of *March*, 1814, a deed to lead the uses of a common recovery about to be suffered of the premises, was made by the said *James Hamilton*, conveying the said *Bush Hill* estate and city square of ground to Dr. *Thomas Parke*, in fee, wherein it was covenanted, that *James Lyle* should be the demandant, *Thomas Parke*, tenant to the *præcipe*, *James Hamilton*, first vouchee, and *Andrew Hamilton*, the second vouchee, who should vouch the common vouchee, and that the estate should be for the use of *James Hamilton* in fee.

At the *March* term, 1814, of the Supreme Court in the county of *Philadelphia*, a writ of entry was accordingly issued by *James Lyle* demandant, against *Thomas Parke*, physician, tenant, and a common recovery of the premises suffered with treble voucher.

On the 5th of *April*, 1814, the said *James Hamilton* granted and conveyed, one equal, undivided third part of the said estate, and city square of ground, to his brother *Andrew Hamilton*, and his heirs and assigns, prout deed. On the 7th day of *April*, 1814, articles of agreement were made and entered into between the said *James* and *Andrew Hamilton*, and *Thomas Cadwallader*, and others, authorizing the latter, among other things, to make conveyances of part of the said premises to purchasers, reserving rent charges therefrom to the said *James* and *Andrew Hamilton*, their heirs and assigns.

On the 2d day of *May*, 1814, the said *James* and *Andrew Hamilton*, by their attorney, *Thomas Cadwallader*, duly constituted, and acting under the last mentioned contract of 7th *April*, 1814, granted and conveyed the lot of ground in the declaration mentioned, being part of the *Bush Hill* estate, and premises of which, the said common recovery was suffered as aforesaid to the defendant, *Samuel Richards*, and to his heirs and assigns, reserving a rent charge therefrom to the said *James* and *Andrew Hamilton* and their heirs, of 280 dollars per annum, for ever, payable half yearly.

Samuel Richards, by virtue of the said grant and conveyance, entered into, and was, and is seised of the said premises in the last mentioned deed described.

The said *James Hamilton*, thus seised, together with his brother *Andrew*, of the said rent charge, in *July* 1817, died intestate, unmarried and without issue, leaving as his heirs at law, the said *Andrew Hamilton*, his brother, and his sisters *Margaret*, *Mary* and *Rebecca*, and his two nieces *Mary Beckett* and *Ellen Lyle*, daughters of his sister *Ann Lyle*, deceased.

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On the 11th day of *November*, 1818, *Mary*, now wife of *Henry Beckett*, then living unmarried, granted and conveyed her part and share of the said *James Hamilton's* estate to *James Lyle*, *John B. Newman* and *William H. Tod*, and their heirs, in trust, &c.

On day of *March*, 1819, *Ellen Lyle*, now the wife of *Hartman Kuhn*, together with her said husband, granted and conveyed her part and share of the said *James Hamilton's* estate to *Joseph R. Ingersoll* and *William Rawle, Jr. Esqrs.* their heirs and assigns in trust, &c.

On the 27th of *September*, 1819, the said *Rebecca*, one of the sisters of the said *James Hamilton*, and the wife of *Francis L. O'Beirne*, together with her said husband, granted and conveyed her part and share of her said brother *James's* estate to *James Lyle*, *Joseph R. Ingersoll*, *Edward Ellice*, and *Thomas B. Barclay*, and their heirs in trust, &c. prout deed.

The question for the consideration of the court was, did the common recovery above mentioned, vest in the said *James Hamilton* in his life time, an estate in fee simple, in the premises, so as to enable him to grant one third thereof to the said *Andrew Hamilton*, and his heirs, and to enable them to make a good estate in fee, in the premises to the defendant.

This case was very ably and elaborately argued by *J. R. Ingersoll* and *Binney* for the plaintiff, and *J. Sergeant* for the defendant; but the authorities and arguments are so fully cited and commented upon, in the opinions of the Judges, that we have not deemed it requisite to detail the arguments of the counsel.

The opinion of the court was delivered by

TILGHMAN, C. J. *James Hamilton*, the elder, being seised in fee, of the land which is the subject of this suit, devised it to his nephew, *William Hamilton*, for life, remainder to the first son of the said *William*, for life, remainder to that first and every other son and sons of the said first son of the said *William*, successively, according to priority of birth, in tail male, remainder to the second son of the said *William Hamilton*, for life, remainder to the first and every other son and sons of the said second son in tail male as aforesaid, remainder to the third, fourth, fifth, and every other son and sons of the said *William Hamilton*, successively for life, with remainder to their issue in tail male as aforesaid, remainder to the testator's nephew *Andrew Hamilton* (elder brother of the said *William Hamilton*, and heir at law of the testator,) for life, with remainders to the first and every other son and sons of the said *Andrew*, for life, and remainders to their issues in tail male, successively, (precisely in the same manner as in the devises to the sons of the said *William Hamilton*,) remainder to the heirs of the body of the said *William Hamilton*, remainder to the heirs of the body of the said *Andrew Hamilton*, remainder to the right heirs of the testator. The will was dated the 4th *March*, 1776,

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and the testator died in the year 1783, at which time, his nephews *William*, and *Andrew*, were both living, and also the said *Andrew's* first son, *James*, and his second son *Andrew*. *Andrew Hamilton*, the father, died before his brother *William*, leaving issue, two sons, *James* and *Andrew*, and four daughters. *William Hamilton* died without issue, having never been married. After his death, *James Hamilton*, (son of *Andrew*,) conveyed the land aforesaid, by deed of bargain and sale, to Doctor *Thomas Parke* in fee. To this deed, *Andrew Hamilton*, (son of *Andrew*) was a party, and the declared intent of it was, to make the said *Thomas Parke*, tenant to the *præcipe* in a common recovery which was to be suffered for the purpose of vesting the fee simple in the said *James Hamilton*. In pursuance of this intent, a common recovery was suffered in the Supreme court, at *March Term*, 1814, with treble voucher, in which *James Lyle* was demandant against the said *Thomas Parke*, tenant, and the said *James* and *Andrew Hamilton*, (sons of *Andrew*) were severally vouched. On the 5th *April*, 1814, *James Hamilton*, conveyed one third of the premises to his brother *Andrew* in fee. On the 2d *May*, 1814, the said *James* and *Andrew Hamilton* (sons of *Andrew*) by their attorney, *Thomas Cadwalader*, conveyed a certain part of the premises, to *Samuel Richards*, the defendant, in fee, reserving a yearly ground rent of 280 dollars. After the making of this deed, the said *James Hamilton* died without issue, having never been married. The question for the consideration of the court is, whether upon the facts above stated, the last mentioned deed of *James* and *Andrew Hamilton*, vested a good estate in fee simple, in the said *Samuel Richards*. This will depend chiefly, upon the effect of the common recovery before mentioned, and therefore it is necessary to consider, in the first place, of what estates, *James* and *Andrew Hamilton* (sons of *Andrew*) were seised at the time of that recovery. It appears, that *James* was seised of an estate for life in possession, with contingent remainders to his sons successively, in tail male, and that *Andrew* had a vested remainder for life, with contingent remainders to his sons successively, in tail male, after which, a remainder in tail general was vested in *James*, with remainder in fee simple vested in the said *James* and *Andrew*, and their sisters. When I say that *James Hamilton* had a vested estate tail, I mean, vested in interest, not in possession. I incline to the opinion, that he took this interest by way of descent from his father, although, for the purpose of my argument, it is not material, whether it was so or not. For, however he took it, he had the whole estate tail in him, which would have descended from his father, supposing his father to have first taken it. *James* was heir of the body of his father, *Andrew*, and the descent from him (*James*) to his issue, if he had issue, would have been precisely the same, whether he came to the estate by descent or by purchase. And although the estate tail was not vested in possession, it was such an

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interest as might be barred by a common recovery. I shall give no opinion, (because I think it unnecessary,) whether, previous to the suffering of the recovery, the estate for life of *James Hamilton* was merged in his estate tail general in remainder, or in the fee simple expectant on the estate tail which was vested in him, (*in interest*,) in common with his brother and sisters, or whether the estate for life in *Andrew*, interposed between *James'* estate for life, and his inheritance prevented the merger. The effects of the common recovery will afford sufficient ground for deciding the present question, supposing the life estate of *James* not to have been previously merged. The recovery was well suffered. Doctor *Parke* was a good tenant to the *præcipe*, by virtue of the conveyance to him from *James Hamilton*, and the said *James*, and his brother *Andrew*, were regularly brought into court as vouches. I think unnecessary also, to decide, whether the suffering of the recovery was, in itself, a forfeiture of the life estate of *James Hamilton*. That seems to be a point not well settled, because, inasmuch as *James Hamilton* had in him an estate tail in remainder, and it is supposed by some, (and *Coventry*, in his *Treatise on Recoveries*, p. 53. thinks it the better opinion,) that he might rightfully suffer a recovery for the purpose of barring that estate tail. It is certain however, that one effect of the recovery was, the distribution of the general estate tail vested in *James Hamilton*, and inasmuch as *James* became seised of an estate in fee simple, in possession, in conveyance of the recovery, it seems to me that his life estate was gone. It was merged in that fee simple newly acquired, and there being no son of *James* to enter, at the moment his life estate expired, the contingent remainders limited to his children, were destroyed. It was of no importance whether the life estate of *James* ceased, by forfeiture or otherwise. Whenever a life estate becomes united with the inheritance, it is extinguished. The less is merged in the greater. Consequently, the life estate of *James Hamilton* being extinguished, and also the contingent remainders limited to his issue male, his brother *Andrew*, in whom an estate for life was vested, might have entered, if he had not been a party to the recovery. It appears also from the facts in this case, that the life estate of *James Hamilton* was at an end, by his natural death, (independently of all considerations of the common recovery,) and he having left no issue, the contingent remainders to his son, were out of the question, and there would have been nothing to bar the entry of *Andrew*, who would have then an estate for life *in possession*, under the will of the testator, if he had not been party to the recovery. Then supposing the estate for life of *Andrew* (the son) to be extinguished by the common recovery, all the contingent remainders depending on it, full, and the estate tail in *James* being barred by the same recovery, there was nothing to impeach the fee simple in *James* which was declared to be in him by the descent to lead the uses of the recovery. So that the decision of the

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case now before the court, depends, mainly, on the effect of the recovery on the estate of *Andrew Hamilton*, (son of *Andrew*.) If in consequence of his coming in as vouchée, his life estate was destroyed, the contingent remainders to his issue male, were likewise destroyed, because at that time he had no issue of either sex. In *Coventry on Common Recoveries*, 53, it is said, "that if a tenant for life, be vouched in a recovery, he will certainly lose his estate, for that would be a *disclaimer on record*." In support of this assertion, *Sir Wm. Pelham's Case*, 1 Co 15, is cited, and comes up to the point. It was there decided, that the tenant for life, who was vouched in the recovery suffered by *Sir Wm. Pelham*, lost his estate, and the immediate entry of the person who was seised of an estate tail in remainder, was lawful; the estate tail not being barred, because the persons who suffered the recovery were not seised of the inheritance. On this principle, the life estate of *Andrew Hamilton* (son of *Andrew*) was destroyed, because he was party to the deed from his brother *James* and others, to Doctor *Parke*, in which the uses of the subsequent common recovery were declared, and in pursuance of that deed he was vouched; and became a party to the recovery. I think there cannot be a doubt, that his life estate was forfeited. He volunteered in the common recovery. For, he had no pretence, of an estate tail, in remainder, to bar, as his brother *James* had. He disclaimed the title under which he held his life estate, and set up another, adverse to it, which he warranted. What more could he do? In what manner could he more forcibly and efficaciously destroy the title under which he held, than by his disclaimer and warranty on record? Then, the life estate of *Andrew Hamilton*, being extinguished, the contingent remainders dependent on it, were without support, and fell to the ground, and the general estate tail with the fee simple, in remainder after it, having been barred by the recovery, the estate in fee simple which was vested in *James Hamilton* by the said recovery, became indefeasible, and the title conveyed to the defendant by *James* and *Andrew Hamilton*, was good. But it has been strenuously contended by the counsel for the defendant that the principle of forfeiture by the act of a tenant for life, however firmly it may be established in *England*, is not suitable to our institutions, and has never been adopted in *Pennsylvania*. Whether the life estate of *Andrew Hamilton* was extinguished by forfeiture, or otherwise, is immaterial. And I have no doubt, that in some way, either by his own conveyance and warranty on record, or by estoppel, if not by forfeiture, it was extinguished. But it is of importance that it should be now decided, whether the law of forfeiture, applied to life estates on which contingent remainders depend, exists in this commonwealth. Perhaps I might be excused from doing any thing more on the present occasion, than referring to the opinion delivered by me on this point in the case of *Dunwoodie v. Reed*, 3 Serg. Rawle, 435. But I think it better to make some ad-

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ditional remarks, because the court, which consisted but of two judges, when that case was decided, was divided in its opinion. Besides, the principle is of great and general concern, and we have had the advantage of a very able argument, in which every thing that could be said, on either side, was brought forward. The defendants first position is, that common recoveries have no force in this commonwealth, except what is derived from "the act for barring estates tail," passed 27th *January*, 1749—50; and inasmuch as this act gives them no other efficacy, than that of barring estates tail, they cannot work a forfeiture of an estate for life. In examining this point, I will consider first, whether there be any thing in the nature of a common recovery unsuitable to the condition of the first settlers in *Pennsylvania*; second, whether *in fact*, it was used for the purpose of barring estates tail, before the act of 1750; third, what has been the legal tradition on this subject

A common recovery is, in form, a real action founded on a right asserted by the demandant and denied by the tenant. In that point of view, it is as proper for us, as any other real action. But a recovery suffered *by consent*, has always been considered as a *common conveyance and assurance*, and is not to be compared to a judgment, or proceeding, in any other suit or action. Such is the language of Chief Justice WILLES, in 1 *Wils.* 73, and such was the opinion of the Court of Kings' Bench, as far back as Lord COKE's time, 1 *Co.* 15. This proceeding, applied to estates tail, answered a most beneficial purpose. The inconveniences of those estates, were felt, in *England*, long before a remedy was devised. The House of Peers adhered to the statute *de donis*, because it protected their estates from forfeiture, and transmitted them, unincumbered with debts, to the heir. It was vain, therefore, to expect relief from Parliament. In this situation, the matter stood, when the courts of justice encouraged the device of a common recovery, for the barring of estates tail, founded on a fiction, and not to be defended on any principle of sound reason. But it answered a good purpose, and the end justified the means. The law was as well settled, and the efficacy of common recoveries, in barring estates tail, was as notorious when the royal grant of *Pennsylvania* was made to *William Penn*, as any other part of the *English* law. Our ancestors, who came out, on the faith of the charter, brought with them the common law in general, although many of its principles lay dormant, until awakened by occasion. Some parts of the common law, indeed, would have been altogether unsuitable to the spirit of the government about to be established in *Pennsylvania*, and therefore were never adopted. But there was no inconvenience in holding real property by the same kind of estates as in *England*. Accordingly we hear of estates in fee simple, fee tail, for life, and for years, tenancy by the curtesy, and in dower, &c. &c. from the first settlement of the province. We hear also of the *English* modes of conveyance. Bargain and sale, lease and

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release, grants, surrender, &c. &c. Fines and feoffments, are mentioned also, in several of our early acts of assembly, as modes of conveyance understood to be legal, although I believe there is no instance of their being actually used, till a much later period. The first record of a fine which I have been able to discover, is in the Court of Common Pleas of the county of *Philadelphia*, in the year 1752, (*Say v. Phillemore*.) There might have been a question whether it was expedient to introduce *estates tail*, into a country where the division of the estate among all the children, on the death of the parent, was a favourite principle. But, to adopt estates tail, with all their inconveniences, and at the same time to reject the remedy for these inconveniences, would have been a defect of judgment not to be attributed, without positive proof, to *William Penn* and his followers. If ever there was a country, in which common recoveries for the purpose of barring estates tail, were expedient, that country was *Pennsylvania*. This leads me to consider whether *in fact*, estates tail were barred by common recoveries before the act of 1750. Before I gave my opinion in the case of *Dunwoodie v. Reed*, I directed the records of the Supreme Court, and Court of Common Pleas of *Philadelphia* county, to be searched, and was informed, (as mentioned in that opinion,) that one recovery had been suffered in the Supreme Court, and five in the Court of Common Pleas, before the passing of the act for the barring of estates tail, (27th *January*, 1749—50.) As to the supposed recovery in the Supreme Court, there was a mistake. I have since examined the records of that court myself, and it appears, that the record of an indictment for a forcible entry, was put, by accident, into the box appropriated to common recoveries, and the clerk who made the search at my request, mistook it for a common recovery, and so reported it. I think it probable that there was a mistake also, as to the number of recoveries reported to me as having been suffered in the Court of Common Pleas; since the industry of the counsel concerned in the present cause has discovered but three instead of five. The mistake however is not very material, as it still appears that at least three were suffered before the act of 1750. There may have been others, in the counties of *Chester*, *Bucks*, and *Lancaster*, the records of which have not been searched. But as they do not appear, no argument can be drawn from any conjecture concerning them. The counsel for the defendant concludes, that since no records have been produced, of common recoveries before the year 1744, and only three before making of the act of assembly in *January*, 1750, that mode of proceeding could not have been considered as legal, for if it had, there would have been no need of the act of assembly. And in further support of his opinion the counsel for the defendant relies on what is reported to have fallen from the mouth of Chief Justice SHIPPEN, in the case of *Morris' Lessee v. Smith*, 1 *Yeates*, 244. The words are these: "There was a time, within my remembrance, when lawyers held, that common

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recoveries for docking estates tail, could not be legally suffered in *Pennsylvania*, and the first that was suffered will be found among the records of the Common Pleas, in my hand writing, when a young student. The practice however was not generally adopted till the passing of the act of assembly in 1750, which expressly authorised it." I should be the last man to question the veracity, or the accuracy of Chief Justice SHIPPEN, for whom I always entertained the most affectionate regard. But it would be going too far to conclude, from the expressions I have quoted, that common recoveries were not legal before the act of assembly. When Mr. SHIPPEN wrote the proceedings in the recovery mentioned by him, he was a student in the office of Mr. *Francis*, and must have been about fifteen years of age. This was in the year 1745, when it is supposed, that Mr. *Francis* was the most eminent lawyer in *Pennsylvania*. At that time, then it could not with propriety have been said, to be held by lawyers, that a common recovery could not be legally suffered. But, no doubt, Mr. SHIPPEN had heard, that in former times the legality of the practice had been questioned, and that may be considered as the fair amount of his meaning. That however, by no means, proves the illegality of common recoveries. We may account for their not being introduced at an earlier period than 1745. It would be some time from the first settlement of the province, before much inconvenience could be felt from estates tail, and when it was felt, if the estate tail was created by will, (the usual source of such estates,) our ancestors had a very simple way of getting over it, that is, by bringing an action against the executor of the person by whose will the entail was created, founded on some *real* or *supposed* debt due from the testator, and selling the entailed land by virtue of an execution on the judgment in that action. By this mode of proceeding, the purchaser under the execution came in of a title paramount the estate tail. But there is another reason why it was so long before either fines or common recoveries were brought into practice. From what I have been able to learn, of the early part of the history of *Pennsylvania*, it was a long time before she possessed lawyers of eminence. There were never wanting, men of strong minds, very well able to conduct the business of the courts without much regard to form. Such, in particular was *Andrew Hamilton*, the immediate predecessor of Mr. *Francis*, and the father of *James Hamilton*, the testator. But Mr. *Francis* appears to have been the first of our lawyers, who mastered the technical difficulties of the profession. His precedents of pleadings have been handed down to the present day, and his Common Pleas book, which is in my possession, is an evidence of his great industry and accuracy. Having turned his attention to estates tail, he was of opinion, that they might be barred by common recoveries, and accordingly introduced them. His example was followed by *Ross* and *M'Land*, also eminent lawyers of that day, and the public attention was thus

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drawn to the subject. It was the anxious desire of the people, that there should be some certain mode of barring estates tail. Although recoveries had been suffered, there were still doubts on the subject, and recoveries even though good, were attended with considerable expense. Petitions were presented to the legislature, and it is highly probable, that many of the petitioners wished for a law authorising the barring of estates tail by a *common deed of conveyance*. This had long been a favourite object, for we find that acts had been passed for that purpose, in 1705, and 1710, the last of which was repealed by the Queen in council, in 1713. See *Galloways Ed. Laws, appen. p. 9*. It was probably, their experience of the unwillingness of the Crown, to permit the barring of estates tail by a *common deed*, which induced the legislature in 1750, to confine the mode of barring these estates to fine, and common recovery, to which it gave the same efficacy that they possessed in *England*. I consider this act of 1750, as no more than *declaratory of the law which existed before*. It removed all doubt, and quieted the minds of the people on an important subject. To be sure, it is not *called* a declaratory act. But instances are numerous, of acts, declaratory in their *nature*, though not so in *name*.

As to the suggestion, that, by the act of 1750, the operation of common recoveries was confined to the barring of estates tail, I can perceive no ground for it. The sole intent of the act, was to provide a certain mode for the barring of estates tail. It recites the inconveniences attending these estates, and then gives to fines, and common recoveries, the same efficacy in barring them, which they possessed in *England*. There it stops, there is not one word as to the operation of fines, or recoveries on any other subject. It might as well be said, that the operation of fines was confined to estates tail. But that has not been pretended. That the operation of common recoveries was not confined to the barring of estates tail, in the opinion of the judges of this court, who reported to the legislature the *British* statutes in force within this commonwealth, may be clearly inferred, from their reporting the *Stat 14, Eliz. Ch. 8*, as being in force, which was made for the avoiding of recoveries suffered by collusion, by tenants for term of life. It is clear, therefore, that if the operation of a common recovery would destroy the estate of tenant for life, by forfeiture, on common law principles, there is nothing to gainsay it in the act of assembly. But it is contended also, that independently of the act of assembly, forfeiture is founded altogether on feudal principles, and therefore, ought not to be adopted in *Pennsylvania*. That argument would carry us too far. The principles of the feudal system are so interwoven with our jurisprudence, that there is no removing them without destroying the whole texture. When our ancestors claimed the benefit of the commonlaw, they took it as it was, except such parts as were manifestly unsuitable to their condition. Now, so far from any

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thing unsuitable is there in the principle of forfeiture applied to the case before us, that it appears to me to accord exactly with the spirit of our constitution. *Pennsylvania* has been always anxious to remove obstructions to the free alienation of lands. Contingent remainders are a great obstruction to free alienation; of which, nothing can afford a stronger proof than the situation of the *Hamilton* estate. Had the intention of the testator been carried into full effect, the progress of the city of *Philadelphia* would have been arrested for half a century, and perhaps much longer, in a very interesting quarter, and for what purpose? Certainly for no other than the gratification of *family pride*. This is a feeling which every man has a right to indulge, within the limits of the law. But no man has a right to say, that all principles which tend to restrain his inclination, are unreasonable, and unfit for the country. It cannot be denied, that the suffering of a common recovery by tenant for life, works a forfeiture of his estate by the common law, and consequently, destroys all remainders, which at the moment of forfeiture, rest in contingency. It lies upon those then, who deny the existence of the law of forfeiture in *Pennsylvania*, to prove it. I do not perceive, that any such proof has been given. The case of *McKee's Les. v. Pfout*, 3 *Dall.* 486, has been relied on. The question in that case was, whether a conveyance in fee by tenant by the curtesy, by deed of bargain and sale, recorded according to the act of assembly, "for acknowledging and recording of deeds," passed in the year 1715, was a forfeiture of the estate. The argument in favour of forfeiture was founded on that part of the act, which declares that "such deeds shall be of the same force and effect here, *for the giving possession and seisin, and making good the title and assurances of lands, tenements, and hereditaments, as deeds of feoffment, with livery of seisin, or deeds inrolled in any of the courts of record in Westminster, are, or shall be, in the kingdom of Great Britain.*" It was decided that there was no forfeiture, *because it was not the intention of the act to work a forfeiture.* These are the expressions of C. J. M'KEAN: SHIPPEN, J. was of the same opinion. He says, "that in allowing to deeds recorded, *the same force and effect as feoffments with livery*, the intention of the act is expressly restricted to *giving possession and seisin, and making good the title and assurances of lands.*" The reasons assigned by these judges are quite satisfactory. Independently of the act of assembly, a deed of bargain and sale did not work a forfeiture. But it was the intention of the act to facilitate the mode of conveyance by bargain and sale, and not to create a forfeiture. Therefore, it shall not be so construed as to create a forfeiture. What would be the effect of a feoffment with livery, is another question, and I give no opinion on it. It is a kind of conveyance out of use; indeed, I have never heard of one in *Pennsylvania*. But common recoveries have been in great use. The counsel for the plaintiff have furnished us with lists of 33 in the

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Supreme Court, from the year 1763 to 1796, and 175 in the Common Pleas of the county of *Philadelphia*, from *September*, 1750, to *December*, 1798. Of these they suppose that at least seven were for the purpose of destroying contingent remainders. But this is a point not easily ascertained. What words make a contingent remainder, it is very often difficult to decide. Many recoveries may have been intended to bar estates tail, and yet in fact, may have destroyed contingent remainders. So that there is no knowing the extent of the mischief which may be done, by deciding now, that a common recovery was not a forfeiture of an estate for life. I have taken pains to ascertain the opinion of the bar, transmitted to us by tradition, from the year 1750. And on that point I have no doubt. A tradition of this kind must naturally be looked for in this city, where in 1750, and long afterwards, the principal lawyers resided. I have often heard the subject mentioned by those who are now no more, but never heard the forfeiture doubted. I will mention one fact, which goes far, in showing the opinion of the old lawyers. I know from good authority; that Mr. *Chew*, who was chief justice at the time of the revolution, gave to the testator *James Hamilton*, the draught of a will, or part of a will, in which was inserted a clause, appointing trustees for supporting contingent remainders. Mr. *Hamilton*, not understanding the necessity of this provision, omitted it, and hence arises the present dispute. We may see then, that in Mr. *Chew's* opinion, the support of trustees was necessary. Now, I have been informed, that he studied the law under the first *Andrew Hamilton*, and we know that Mr. *Francis* succeeded Mr. *Hamilton*, and Mr. *Chew* succeeded Mr. *Francis*, in the office of Attorney General, and in professional eminence. So that I think we have pretty good evidence of the opinion of this bar, from about the year 1750 to 1776. When we are inquiring whether a certain mode of conveyance, usual in *England*, was formerly introduced in *Pennsylvania*, it is very much a matter of fact, and a fact which must have been within the knowledge of professional men. So that, in the absence of positive proof, great regard is due to the general understanding of the profession. In this point of view, there is great weight in the opinion of the late Mr. *Edward Tilghman*, under whose direction, the common recovery now in question was suffered. His legal abilities are well known to the gentlemen of this bar, but the circumstance which attaches peculiar importance to his opinion in this case is, that he was in the practice of the law in the year 1774, and in habits of familiar acquaintance with the lawyers of that day, several of whom were at the bar in the year 1750. It is worthy of remark, that in the case of *M'Kee v. Pfout*, mentioned before, where the counsel for the plaintiff argued against the forfeiture, it was taken for granted by them, that a *feoffment with livery*, would have occasioned a forfeiture, nor did any intimation to the contrary fall from the court. Now, certainly a feoffment with livery, could not have

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more force than a common recovery. The late Judge YEATES, in his opinion in the case of *Findlay's Lessee v. Riddle*, 3 Binn. 154, says, "that contingent remainders may be *preserved from being defeated* before they come in use;" meaning as I apprehend, that they might be defeated in the usual manner, by such a conveyance, or assurance as would incur a forfeiture of the estate for life, and that they might be preserved by the appointment of trustees, for the purpose of entering in case of forfeiture, and holding as long as the remainder was in contingency. For my own part, having given to this interesting subject, all the consideration which it merits, I have been led to the conclusion, that the common law doctrine of forfeiture, for the purpose of barring contingent remainders, is congenial to the spirit of our constitution, and therefore, in principle, it ought to be extended, as in fact, it has been extended to the state of *Pennsylvania*. And upon the whole of this case, I am of opinion, that the common recovery vested in *James Hamilton*, the younger, an estate in fee simple, in the premises, so as to enable him to grant one third thereof to his brother *Andrew*, in fee, and to enable them both to convey a good estate in fee to *Samuel Richards* the defendant.

GIBSON, J. When the recovery was suffered, the existing interests under the will stood thus: An estate for life in *James*, vested in possession, with successive contingent remainders in tail male to his first and other sons: an estate for life in *Andrew*, vested in interest, with successive contingent remainders in tail male to his first and other sons: remainder in tail to *James*, either vested or contingent: reversion in fee, to the right heirs of the testator. It is argued by counsel, that the remainder in tail to *James*, is contingent; and if that be so, it disposes of the point, that the preceding contingent remainders limited to the sons of *Andrew* were barred by the union of the several vested parts of the fee in *James*; and this, on the ground of there being no estate tail in existence which could be the subject of a common recovery: which would reduce the controversy to the question agitated in *Dunwoody v. Reed*, whether a recovery can, for any purpose, have an effect, except as an instrument in barring an estate tail. With respect to that, I hold the same opinion now, which I did then, and shall say something further with respect to it, in the sequel. But I see no reason to doubt, that the estate tail limited to the heirs of *Andrew*, the father of *James* and *Andrew*, and the nephew of the testator, was vested at all events, at the death of *Andrew* the father. It is unnecessary to inquire whether the words by which an inheritable estate is devised to *his heirs*, are to be taken as words of limitation by reason of the devise of a prior freehold estate to himself (although I incline to think they ought;) because it is clear, that at his death, his son *James*, answering the description in the devise, took an immediate vested interest under it, either by descent or purchase: which is sufficient for the purpose of the argument. The suggestion, that

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if *Andrew* the father never took an interest in this estate tail, and it be considered as having for the first time vested in his son *James*, *Andrew* the brother of *James* could never inherit from him, and that to let him in, there would have to be successive estates tail limited to the sons of *Andrew* the father, is plausible but without foundation. *Mandeville's* case, 1 Inst. 26, is exactly in point, and proves that *Andrew* might take; and whether by descent from the ancestor although he had nothing, or by purchase as answering the description in the devise, is immaterial. The matter is discussed in a note in *Fearne* on *Remainders*, 82, where the law is considered to be settled, although on principles which are not easily discoverable. Then as there was a vested estate tail to be barred, the common recovery was consequently a proper form of conveyance even under my construction of the act of 1750, and had the effect of enlarging the estate tail to a fee, and of uniting it with the estate for life of *James* under the deed to lead the uses. This even without any participation by *Andrew* would leave only his estate for life outstanding; and the question is whether his joining in the covenants in the deed to lead the uses, and suffering himself to be vouched without counterpleading the warranty, and vouching over the common vouchee, destroys his estate in favour of *James*, under the deed to lead the uses: and I have no doubt that it does. Where a common recovery is a legal mode of conveyance, whatever may be thought of the construction of the act of Assembly in other respects, it must necessarily have all its common law effects, on the estates of those who join in it. It is therefore unnecessary to inquire whether *Andrew's* estate passed by surrender, release, or in any other manner: it was clearly extinguished by his warranty, which estops him from ever claiming it: for all are estopped by a recovery who cannot falsify it, whether they come in as vouchees or were originally parties. *Pells v. Brown*, Cro. Jac. 592. It is impossible therefore to avoid the conclusion that *Andrew's* estate was barred; and if so, *James's* life estate being merged in the fee, which could be prevented only by the existence of *Andrew's* estate, the contingent remainders limited to the sons of *Andrew*, are gone. If there had not been a vested estate tail in the way, the same union of the existing vested parts of the fee, might have been produced by any form of conveyance either under the statute of uses, or at the common law, but as there was such an estate tail, the only form of conveyance which could produce such a union, (I do not speak of a deed acknowledged in court under our act of Assembly,) was a common recovery. The effect of this union in barring contingent remainders is so explicitly stated and so clearly explained by Mr. *Fearne* as to preclude any attempt to render it clearer.

On the question whether common recoveries were originally brought here by our ancestors as a part of the common law, or were introduced for a special purpose by the act of 1750, I have already expres-

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ed my opinion in *Dunwoody v. Reed*; and as I have discovered nothing in the argument here to shake my confidence in that opinion, but on the contrary, much to confirm me in it, I shall state the reasons that weigh with me, somewhat more at length than I did in the case just alluded to.

A position has been taken by counsel, which, in its full extent, I think no one will concede; that on the arrival of our ancestors in the province, the whole common law of England was cast on them, as an inheritance is cast on the heir, without power on their part to prevent its descending on them; the whole or particular parts to be entered on and occupied in actual use, as occasion might from time to time require. It is undoubtedly true as a general rule, subject however to exceptions, that the first settlers of a colony carry with them the laws and usages of the mother country: nor did this rule require the sanction attempted to be given to it in the sixth section of the charter to *William Penn*, which declared that the laws for regulating property and punishing felonies should be and continue in Pennsylvania, the same as they should be, for the time being, by the general course of the law in England; until they should be altered by Mr. *Penn*, and the freemen of the province. This provision was merely directory or declaratory of a general principle which existed before. But to a greater or less extent, there necessarily exists in every country a species of legislation by the people themselves, which in England and in this country is the foundation of the common law itself, or in other words general custom obtaining by common consent: and this sort of legislation will be more freely used in the infancy of a colony, where an abrupt change of the circumstances and condition of the colonists must require a correspondent alteration of the laws and usages of the mother country to fit them to actual use, than in a country whose jurisprudence has been the gradual product of time and experience. In the infancy of this colony it produced not only a modification of some of the rules of the common law, but a total rejection of many of the rest. In *Carson v. Blazer*, 2 *Binney*, 484, it is said by Judge YEATES, whose personal experience extended half a century back, and who was well skilled in the earlier traditions of the province, that the uniform idea had been that only such parts of the common law as were applicable to the local situation of the colonists were received by them, and in that case it was held by the whole court that the common law distinction with respect to rivers that are navigable and those which are not, is inapplicable in this state. And in *Stoever v. Whitman*, 6 *Binn.* 420, it was declared by Chief Justice TILGHMAN, in delivering the opinion of the court, that the rule of the common law which renders seisin in the grantor necessary to the validity of a conveyance of land, *was never adopted here*. So, there is no law in Pennsylvania by which the property in goods is divested from the true owner by a sale in *market overt*. *Hossack v. Weaver*, 1 *Yeates*, 478, *Hardy v. Metzgar*, 2 *Yeates*, 347, *Easton v.*

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Worthington, 5 Serg. & Rawle, 130. On the ground of at least a modification of a rule of the common law rest the right of a tenant to the way going crop; the power of a husband to affect his wife's right of dower by judgment or mortgage; and the right of a sheriff who has levied household furniture to suffer it to remain in the possession of the debtor without impairing the lien of the execution. I will add only one instance more which at present occurs to me. At the last term for the western district, it was held by this court in *Little v. Gordon, 8 Sergt. & Rawle, 533*, that the common law rule of responsibility of common carriers, is inapplicable to carrying for hire on our fresh water rivers; although it is admitted to govern in cases of carrying by land. Now this was not a recognition of a new law but of the common consent of the country in opposition to the alleged existence of an old one. I do not say that non user alone ought to be considered as conclusive evidence of universal assent, for we have a modern instance of assize of nuisance having been maintained; *dormit aliquando lex, moritum nunquam*; but where to a clear and unqualified non user for more than half a century, we find subjoined positive acts of the whole community evincing a disclaimer of the existence of a particular law, it ought to be conclusive: for it is not to be credited that a law can be in force, and its existence, at the same time be a secret to every member of the community, whether lettered or layman. Now what is the evidence here? The most diligent search has not produced a single precedent of a common recovery from the settlement of the province down to the year 1744. If this part of the inheritance was cast on our ancestors, why did they not enter on it, and use it? Had they no wants to satisfy? We shall see. As early as 1705, and probably much earlier, entails had become common, and the mischiefs arising from them had begun to be felt; for in that year the general assembly passed an act for barring entails by any deed proved or acknowledged and recorded: a mode something like the one they adopted shortly after they became their own masters, and which is in force at this day. This law was repealed, it would seem by the Queen in council. In 1710, the necessity of having some means of avoiding the pernicious consequences of perpetuities, induced the assembly again to press the matter on the attention of the crown, and a new act containing a similar provision was passed, presented, and rejected by the Queen and council. Whether these acts suggested to Sir *William Blackstone* the propriety of abolishing common recoveries even in England, which he recommends in his commentaries, vol. 2, page 361, I will not pretend to say. But under the accumulating evils of perpetuities the forbearance of the assembly and of the people for forty years afterwards, to have recourse to common recoveries, is, to my mind satisfactory evidence of a determination that they were not and should not be in force in the province. It establishes beyond controversy the truth of Chief Justice SHIPPEN's assertion, that there was a time when there was

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but one opinion on the subject. It is unnecessary to seek for the foundation of this opinion; whether it rested on a supposition that the courts had not jurisdiction of real actions, or that this sort of assurance was not adapted to the habits and circumstances of the people, it is sufficient that it prevailed and was entertained by the legislature, the bench, the bar, and the people. No one, however who has attended to the legal history of the province can help seeing that it arose from an utter repugnance to this part of the common law. In the laws agreed on in England we find the colonists expressly stipulating for the right of appearing and defending their causes in person, and exacting as a fundamental condition, "that all pleadings, processes, and records in courts shall be short and in English, and in an ordinary and plain character, *that they may be understood*, and justice speedily administered." 1 *Dall. Laws*, app. 22. But this distaste to form was not confined to proceedings in the courts. By an act passed in 1683, it was declared, "that for avoiding *long and tedious conveyances* and the *many contentions which may arise about the variety of estates*, all grants of estates shall be either of the inheritance; or for lives; or for years, any number not exceeding fifty years; which grants *shall* be thus contracted in these words:" and then follows a form of conveyance, which, as it is short, and discloses the temper of the times better than any observations of mine could do, I shall give word for word. "A. B. the — day of — in the year according to the English account — from him, his heirs and assigns, grants his (here describe the bounds) with all its appurtenances, lying in the county of — containing — acres or thereabouts, to C. D. and his heirs (if in fee) or to E. F. for his life, (if for life) or to G. H. for one hundred years if J. K.: L. M.: N. O. shall so long live, or to P. Q. for fifty years, for the consideration of — pounds in money paid, and of the yearly rent to be paid to A. B. In witness whereof he sets his hand and seal. Sealed and delivered in the presence of R. S. T. Acknowledged in open court, and certified under the clerk's hand and seal, the — day of — and registered the — day of —." Now with this aversion to the intricacy and technical obscurity of conveyances under the statute of uses, or even at the common law, I think it will be conceded the colonists must have had a perfect horror of common recoveries with their vouchers to warranty, their recompense in value, their conveyances to make a tenant to the præcipe, their deeds to lead or declare uses; and many other matters which are as purely technical, and, even to professional men as difficult of comprehension as any other part of the law. It was said with great truth by Chief Justice WILLES in delivering the opinion of the court in *Martin v. Strachan*, 1 *Wils.* 73, that Mr. *Piggott* as able a conveyancer as any man of the profession, had confounded himself and every body else who read his book, by endeavouring to give reasons for common recoveries; and that when men do so, they run into absurdities, and the whole of what they

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say is unintelligible jargon and learned nonsense. In latter days this attempt is abandoned, and the ablest lawyers say a common recovery is only a formal mode of conveyance by which a tenant in tail is able to convey a fee simple. 2 *Com.* 36. The truth is these feigned recoveries, although not only defensible, but under the circumstances of the times, highly meritorious when restrained to the objects for which they were devised, were originally a mere juggle to elude the operation of the statute *de donis*; but as the courts attributed to them most of, if not all, the properties of recoveries on title, and consequently permitted them to be made the instruments of barring other estates than entails, or at least of turning them to a right, they were, in this respect, insufferably mischievous. If, then, it be true, as is said in the books, that our ancestors brought with them only such parts of the common law as suited their peculiar circumstances, they undoubtedly left this part of it behind them. There were at an early day very few lawyers in the province, and if we judge from the loose practice and imperfect manner of making up judicial records which they have entailed on us, the best of these few unskilled in the forms, whatever may have been their knowledge of the principles, of the law. Fear therefore for the security of titles, from blunders in the manner of conducting the proceeding, would naturally induce the people to reject this mode of conveyance. The popular feeling must naturally have found its way into the general assembly; and we accordingly find it was not till after forty years from the last of their attempts to establish a mode of their own, and after it was rendered certain that nothing better could be obtained that the legislature consented to adopt this method of barring entails, which was forced upon them by the necessities of the people and the obstinacy of the crown. Three recoveries with or without law, had been actually suffered within the space of six years; petitions from several counties were presented—some of them reciting these recoveries and stating that the people were in doubt and apprehension as to the title—others averring that there existed no effectual mode of barring entails—but all concurring in a prayer that something might be done, 4 *vol. of votes of assembly*, p. 99: and the legislature, fearful, as it seems to me, that the practice having taken root, might grow into a law, and recoveries if left to themselves, have all their common law consequences of divesting vested estates; of creating forfeitures, and thereby defeating contingent ones; of creating tortious estates in fee simple in those who before had no pretence of right—objects for which they were originally not designed—and of thus making havoc of the estates of innocent men, not parties to them; adopted and established common recoveries as a mode of assurance, but specially and purposely confined their operations to the barring of entails.

If then recoveries were newly introduced by the act of 1750, and not as a part of the common law, the consequence is inevitable that

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for all other purposes than the barring of entails, they are altogether inoperative, either directly or indirectly; and that when suffered by a tenant for life, they are an unmeaning ceremony, producing no legal results. The three cases of recoveries suffered during the six years immediately preceding the act, all of which were advised by Mr. *Francis*, an able lawyer, and by two other gentlemen, whose opinions are not entitled to the same weight, ought not to be considered as having settled the law, because it had been previously settled in a different way by the universal acquiescence and assent of the people during a period of seventy years. I readily admit, that if no act of assembly had been passed on the subject, the practice would have been continued on the footing of the common law, because the necessities of the country were irresistible; and as by this time, a countless number of titles would have depended on it, the courts would have been precluded from inquiring whether in its origin it were right or wrong: the maxim of *communis error*, would have been applicable to it with conclusive force. But the legislature taking the matter up on the foot of the practice as it then stood, had a right to lay their hands on it, and while it was yet in the gristle, to bend it and mould it at their pleasure. That they thought they were introducing recoveries for the first time, and not enacting a declaratory law, is clear, not only from the particular expressions which they used, but from the fact of their having thought it necessary to render previous recoveries valid by a special provision; which would have been altogether unnecessary if the object had been to declare that common recoveries had all along been in force by virtue of the common law. I am aware that a declaratory statute, made in the affirmative, without negative words express or implied, does not take away those parts of the common law which are not particularly recognized by the statute; and consequently, that the latter should be construed as it was before the recognition by the legislature, *Co. Lit.* 115 a. note 8 and 9. But this rule holds only as to statutes avowedly predicating the existence of the common law. I grant if common recoveries had been in force here for all purposes, this act containing only affirmative words would not have the effect of restraining their operation to the barring of entails: but the very question is, were they so in force? Now, if that were even doubtful, what ought the construction to have been if this question had presented itself immediately after the passing of the act? I shall hereafter inquire whether subsequent circumstances call for a different construction now?

That the actual intention of the legislature was to restrain recoveries to the barring of entails, I flatter myself, I have shown from the history of their introduction. But there are other considerations which ought to induce us to lean to any construction that would produce that result. Since the *Stat.* 14, *Eliz.* c. 8, the only ground on which a recovery suffered by a bare tenant for life in favour of a stranger, is a bar of a contingent remainder, is that such reco-

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very is a forfeiture of his estate in favour of him who has the next vested remainder. At the common law, a recovery against a tenant for life with voucher on a true warranty and recovery in value, bound even a vested remainder, because, as it is said, the particular estate and the remainder are in contemplation of law but one estate; and as one warranty may extend to both, the recompense in value shall extend to both: and a recovery not on a true warranty, but by covin, if it did not bar him in remainder, would at least toll his right of entry: which was pretty near the same thing, as the prosecution of a real action was a troublesome and expensive matter. *Jenning's Case*, 10 *Rep.* 43. But since the 14 *Eliz.*, and indeed, since the 32 *H. 8 c.* 31, which the 14 *Eliz.* has repealed and supplied, a recovery by covin is altogether void against him in remainder; but as it is a common assurance, it was held in *Pelham's Case*, 1 *Rep.* 15, to be a breach of allegiance which the tenant owed to his feudal superior, and therefore, a forfeiture of his estate. This notion of forfeiture enables the courts to elude one half of the intention of the legislature, which was to protect all remainders whether contingent or vested; and to perpetuate in a different form, a part of the very mischief intended to be remedied. By the way, it is remarkable how often the narrow views of the courts have defeated very beneficial acts of the legislature. Of this the statute of uses, the statutes of limitations, and the statute of frauds, the first of which was substantially repealed by the common law courts, and very important parts of the last, nearly so by the Court of Chancery, furnish striking instances. So it happened in some measure with this statute of 14 *Eliz.* Now this principle of forfeiture as affecting other interests than those of the party, is adverse to the habits and feelings of our country, and irreconcilable to the spirit and principles of our civil institutions. The constitution of the *United States* declares that no attainder of treason shall work corruption of blood, or *forfeiture*, except during the life of the *person attainted*; and the constitution of *Pennsylvania*, besides containing the same provision, declares that the estates of those persons who shall destroy their own lives shall descend, or vest as in case of natural death, and that there shall be no forfeiture by reason of any killing by casualty. These two provisions, peculiar to our state constitution, are by no means modern, but were taken from the charter of privileges, granted in 1701 by *William Penn.* I certainly do not pretend that the present is a question of political law, depending on any provision of the constitution; but I cite these passages to show what has all along been the tone of our most eminent jurists, with respect to forfeiture: which in a doubtful case, ought to have weight. The sentiments of Mr. *Penn*, the founder, and in some respects the law giver, of the province, have a direct and legitimate operation on the question before us. The only exception is to be found in *Evans's Lessee v. Davis*, 1 *Yeates*, 332, where, although the point was not directly decided,

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it seems to have been supposed both by the counsel and the court, that forfeiture of the particular estate by treason, would bar a contingent remainder. As I am perfectly sure that no opinion of mine can shake the authority of an opinion of the very able judge who presided, and those who were associated with him, I may without fear, that a doubt expressed by me will, a second time, give rise to a law suit, take leave to say, that if the point were now before this court, I should even on common law principles, come to a different conclusion. By the attainder, the particular estate was neither *extinguished*, nor altered in *quantity*, but existed, after it was vested in the commonwealth, exactly in the plight in which it was held by the tenant; and this was admitted on all hands: for the commonwealth could not have pretended that she held any other interest than the old estate, or by any other title than that of the tenant, or that the particular estate was determined by escheat. The doctrine of forfeiture for crimes, is not of feodal origin, but existed before the conquest, as a part of the *Saxon* law, although escheat was afterwards added to it, so as to operate in attainders of felony, not of treason, after the forfeiture to the crown for a year and a day had been satisfied; and then the land fell to the immediate lord of the fee for want of inheritable blood, 2 *Com.* 215. Now the attainder in *Evans's Lessee v. Davis*, operated only on the individual interest of the person attainted; and if his estate had been annihilated, there would have been nothing in the commonwealth to prevent the person having the next vested remainder, from immediately entering. But there is a manifest difference between a forfeiture which operates as an *assignment* of the parties interested to a third person, and a forfeiture to the remainderman for an act done in dissaffirmance of his estate, which operates by way of extinguishment of the particular estate, and enables the remainderman *to enter into the immediate enjoyment of his estate*. The law is clear, that wherever the particular estate remains in specie, and unaltered in quantity, let it be in the hands of whom it may, it will support a contingent remainder. *Fearne*, 1 *Am. Ed.* 338. And therefore a conveyance of tenant for life by bargain and sale, or by lease and release, destroys no contingent remainder; for it passes only what he may lawfully grant, *ib.* 321—2. Now, the act of attainder in *Evans's Lessee v. Davis*, did no more; and unless there be magic in the word forfeiture, it is difficult to see a difference between a direct grant to the commonwealth, and the doing of an act which transfers exactly the same estate to her by operation of law. So a severance between joint tenants, or a release by the one to the other, is not such an alteration of the particular estate as will bar a contingent remainder, because it is an alteration in quality, and not in quantity: the interest in that respect remaining unchanged, *ib.* 338—9. But a feoffment in fee, or the suffering of a recovery, creates a forfeiture which does operate by way of extinguishment, and gives the next remainderman an immediate right to enter, on the exercise of which

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the contingent remainder is gone. The court seem to have been carried away by the word forfeiture, without considering that it is not, in any case, the abstract effect of the forfeiture, but the actual entry of the person next in remainder, in consequence of it, which defeats the contingent remainder. Thus the acceptance of a fine *come ceo* from a stranger, although a forfeiture, will bar no remainder, if the contingency happen before entry, *ib.* 349. And if tenant for life makes a feoffment on condition, which is broken, and he enters on the feoffee before the contingency happens, the contingent remainder will still be supported, *unless the person entitled to the next vested remainder has entered for the forfeiture, ib.* 349. Thus we see it is the vesting in actual possession of an estate, which although prior in time as to vesting in interest, was posterior in time as to the order of enjoyment, and not the forfeiture *per se*, which bars a contingent remainder. This is, in fact, the root of a principle which extends as well to cases of merger as of forfeiture; for where a remainder in fee or the reversion, is subjoined to the particular estate, they form but one estate; and the tenant having been in possession of the particular estate, is in possession of the whole, and consequently, in possession of an estate posterior to the contingent estate; and a possession already commenced cannot be displaced to make room for an estate which accrued subsequently by the happening of a contingency. So it is with respect to an entry for a forfeiture. I should, therefore, conclude, that if the remainder in *Evans' lessee v. Davis* had been contingent, it would have been preserved, notwithstanding the forfeiture of the particular estate. If the point made by the counsel, and apparently acquiesced in by the court, and the counsel on the other side, could be sustained, we might, considering the frequency of forfeitures in *England*, expect to find some *British* authority for it; but there is none. Sir *Thomas Palmer's* case, *Noy.* 202, *S. C. Moore*, 815, *pl.* 1103, cited by counsel from 13 *Vin. Forfeiture, C. pl.* 12, and recognized as law, by Justice YEATES, was this: A. covenanted to stand seised to the use of himself for life; remainder to B. for life; remainder to the first, second, and other sons of B; remainder to the right heirs of A. A. is attainted of treason; and held that all his sons born after the attainder were barred, and that the king should have the fee discharged. There is no reason given for the decision; and Mr. *Fearne* remarks, that whatever effect the forfeiture of A's. estate for life, and remainder in fee, might otherwise be supposed to have, there was a vested freehold in B. *capable of supporting the contingent remainders to his sons*; and that it is *impossible to reconcile the decision to the settled principles of the law*, without supposing an office, antecedent to the birth of a son of B. finding a fee in A.: in which case, the right of entry even of B. would have been gone. Perhaps the true reason is, it was a Star Chamber decision, between a subject and the royal treasury. However, in *Corbet v. Tichborn*, 2 *Salk*, 576, a case, in all its circumstances,

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like Sir *Thomas Palmer's*, it was held the contingent remainders were not barred; because *of the freehold estate in B.* The case is briefly and unsatisfactorily reported: but we ought not to be led to a conclusion, that the forfeiture of A's. estate for life alone, would have defeated the remainders, if there had not been an estate for life in B. on which they might depend; but as there was a forfeiture both of A's. estate for life, and remainder in fee, the particular estate would, but for the intervening of B's. estate for life, have *merged in the fee*; and the remainders would have been barred on that ground: whereas, the intervening of B's. estate, kept the life estate of it, and the remainder in fee asunder; and the contingent remainders might, therefore, safely depend on the freehold of B. Where, however, there has been a general office finding a fee in the person attainted, although falsely, the crown acquires a fee which can be avoided only by a traverse; and in the mean time, even vested remainders are turned to a bare right; the office producing, in this respect, the same consequences that were produced by a common recovery, suffered by tenant for life, before the *Stat. 14 Eliz.*, and barring a contingent remainder in the same way, by enlarging the particular estate to a fee. But where the office is special, and finds the facts truly; or where the act of attainder operates only on the interest which the party attainted had, the particular estate is not enlarged in the possession of the king, and a person entitled to a vested remainder may, therefore, enter on him at the expiration of such particular estate. *Layton v. Manlove*, *Salk.* 469: and it is difficult to assign a reason why a person who is entitled to a contingent remainder which has vested by the happening of the contingency before that time, may not also enter. The sole reason why a particular estate is necessary to support a contingent remainder, is that a freehold estate cannot be created to commence *in futuro*; and therefore, there must be livery of seisin to pass the remainder out of the grantor when the particular estate passes; the seisin of the particular tenant enuring to, and becoming the seisin of, the remainder man. If there has been such livery and seisin at the creation of the particular estate it is sufficient, and no act of the particular tenant, whether of forfeiture or conveyance, vesting his particular estate in the commonwealth and no more, can make a difference; for if the forfeiture should produce a chasm between the particular estate and the remainder, on the notion that the estate acquired by the commonwealth, was a distinct interest, and not a continuation of the seisin and estate of the particular tenant, it would on feudal principles, which require that some person should always be actually seised to render the services, be a discontinuance, and divest a remainder which was before vested in interest: which it clearly cannot do. Mr. *Fearne* observes, page 308, that there are some few instances of vested remainders taking effect, although the preceding estate be defeated; but in all those instances the legal seisin of the remainder-man was protected, because the

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estate fell back to the grantor, who was in actual possession, and enabled to perform the feudal services: which would not be the case if a forfeiture to the commonwealth created in her a new and distinct estate. I have dwelt longer on this case of *Evans' lessee v. Davis*, than its direct bearing on the question before us, may seem to require; but there is something gained if I can show that the only instance in *Pennsylvania*, in which forfeiture of the particular estate, has been viewed with complacency as a bar to contingent remainder, is in that respect altogether irreconcilable to the principles even of the common law. But it is to be observed, that the remainder was so clearly vested, that neither the court nor the counsel seem to have given this point much attention. And what is of some consequence, we may also observe, in the act of attainder which gave rise to the question, a remarkable degree of care in the legislature, in restraining its operation exclusively to the particular interest of the party attainted: which is in accordance with the spirit of all our provisions on the subject, and furnishes a presumption of intention, with respect to other laws which otherwise might by construction be extended to affect the interest of third persons.

Then if the doctrine of forfeiture has not already been rivetted on us, its palpable injustice, should make us struggle to cast it off. In what light it is viewed by Courts of Equity, we all know. When trustees, to support contingent remainders join in a common recovery, chancery punishes them; and the only reason why that court will not punish a tenant for life, for his own benefit, is, that there being no trust in the case, it has no jurisdiction; and the act for that reason alone, is left to its legal consequences. It is, however, remarked by Mr. *Butler, Co. Lit.* 290, b. n. 1, that titles depending on such an act, can never be recommended; and the power of tenant for life to destroy contingent remainders being *strictissimi juris*, can never expect favour, or any thing beyond mere support. And we are told, that a late learned Chief Justice of the King's Bench, Lord *Kenyon*, brought a bill into parliament to remedy this very grievance. After this, can we doubt that if even the *English* common law courts were furnished with a plausible pretext for ridding themselves of the consequences of forfeiture without disturbing titles, they would not gladly lay hold of it?

To the abstract injustice of destroying these contingent interests, is opposed the policy of unfettering estates; which it is said conduces to the welfare of society, particularly in a republic; and we have heard much of the bad tendency of perpetuities in general, and of the aristocratic notions of Mr. *Hamilton*, the testator, in particular. In this, as in every thing else, extremes are dangerous. There is a wide difference between restraint on alienation for a single descent, and restraint till a whole race shall become extinct. The great objection to entails without the means of barring them, arises from political considerations; the accumulation of property

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in a particular family for ages having a direct tendency to give a preponderance to the aristocracy of wealth and talents, which in a greater or less degree will exist under every form of government: in this country, it might in time be dangerous to our civil institutions. No such danger however can arise from restraint on alienation for one generation; for the next operation of the intestate acts will break the estate into fragments, small enough to allay all apprehensions on that score: and as to any impulse to exertion in the acquirement of property by throwing off restraint in the transmission of it; or of increasing its capacity for usefulness by enabling the possessor to make improvements without risque of losing the the capital invested: that would be more than counterbalanced by permitting every man in possession of an inheritance to have the absolute controul of the fee. I cannot discover the wisdom of that policy which would forbid a father from making a prudent provision for his extravagant and dissolute son, without at the same time giving him power to rob his own unborn children. But the question is not whether this may be done, the law declares it may, but whether it shall be done only by the observance of this or that ceremony. There are but too many instance of improvident sons in republics as well as in monarchies who require provision for their own lives, and are at the same time unfit to have the absolute controul of their patrimony. The exercise of unlimited controul over their estates by men just come of age, has a direct tendency to make them spendthrifts or something worse; and is certainly not the best calculated to increase the public stock of morality. With respect to industry as affected by this sort of restraint, there will always be a sufficient number of unfettered estates to invigorate individual exertion to acquire them; and as regards the public interest in the progress of improvement, there will not be another instance picked out of ten thousand, of one of these fettered estates being situated in the edge of a populous city: and even in this very instance, the experiment has terminated in disappointment and heavy losses, while the improvements are already in a state of delapidation.

If then such ought to have been the decision of this point, had it arisen immediately after the passing of the act of 1750; are there subsequent circumstances which require us to give it a different construction now? That it has not been settled by judicial decision is conceded. But it is supposed that the report of the judges of this court on the subject of British statutes in force here, which includes the 14 *Eliz.*, is an indirect recognition of the doctrine that recoveries are to be considered as existing here by the common law: because if a recovery suffered by a tenant for life were an absolute nullity, that statute would be altogether useless, I am not going to say a word against that report, or that its accuracy ought to be questioned. On the contrary, it is an able performance, settling many questions of extreme perplexity, and therefore, as a standard.

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invaluable in practice. As to all matters which it professes to decide, I think it should be considered conclusive, on the ground that it is a report pursuant to a legislative reference of matters of extreme doubt, the main object of which was to obtain certainty; and I am content that the statute of 14 *Eliz.* shall be considered as in force here: it can do no harm. But I cannot go to the same length in respect to matters of mere inference. Who will say there is not a wide difference between a report of this kind, compiled at short intervals during the recess of the immediate duties of the judges, and a solemn decision with the aid of an elaborate argument by counsel, and the fruit of their research? Or who will say that the point under consideration was in the view of the judges at all? They knew that recoveries existed here in fact; and it would not in like circumstances, occur to one man in a thousand to inquire whether they existed with all their common law properties, or modified by the act of assembly. To suppose that such an inquiry would present itself, is to suppose that the law of recoveries with its whole range of consequences in all their relations, would also present itself: a thing not to be credited. But on a general view, the statute might seem a wholesome provision. and therefore applicable to our actual condition; but this report is not evidence that it had been extended here by actual practice in particular instances, or that a common recovery was ever suffered in *Pennsylvania* with a view to divest a remainder, or to bar a contingent one; or indeed for any other purpose than to bar an entail. If there was an instance before 1750, where is the record? If since, we might expect not only the record, but some trace of it in Mr. *Dallas's* reports, or in the manuscripts of Mr. Justice YEATES, one of the judges who made the report, and who is known to have been a diligent note taker and curious observer of every thing rare and uncommon in the law. All the research of counsel has led to but one instance where the estate to be barred might be mistaken for a contingent remainder. In fixing on particular statutes supposed to be in force here, the judges could, in few instances, be guided by a knowledge of their having actually been recognized in practice. As to many of them (and this among the number) usage was not to be expected; for the simplicity of the manners and customs of the colonists would render it unnecessary for them to resort to laws adapted to a state of society entirely different, where the artificial distinctions of rank had introduced more complex limitations of property, to provide for the younger branches of families according to the various contingencies that might happen before the estate should fall into possession. The judges must, therefore, have frequently been governed by their view of what might be a wholesome application of *English* statutes to our actual condition, without having ascertained, with the greatest precision the state of the law in those respects which were supposed to render such application necessary. The including of the statute 14 *Eliz.* in the report, when fairly consid-

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ered, cannot, therefore, go for more than the inference of an opinion of able lawyers, whose attention had not been particularly directed to the point. Whether the question was argued before the late President HAMILTON in *Dunwoodie v. Reed* and before President WILSON in *Ratten v. Cornish*, on the ground on which it has been argued here, and what degree of investigation it received, I know not. At most the decision in these two cases can be estimated but, as the opinion of two very respectable lawyers, and as such it ought to go for what it is worth: but these cases, and the report of the judges, alone furnish any thing like the expression of judicial opinion on the subject. With respect to the opinion of the bar generally, or of those members of it whose opinions are peculiarly entitled to deference, it is impossible for any one to speak even with a moderate degree of certainty, as the matter has been but very recently drawn into controversy: but I must here take occasion to assert, that from the weight of the opinion of the late Mr. TILGHMAN, as collected from his having advised the common recovery in this case, and with which I was embarrassed in *Dunwoodie v. Reed*, the argument is entirely relieved; for it is altogether incredible that a gentleman so profound in every branch of law, and so peculiarly *au fait* in this, should have disowned the very ground on which we *all* concur on holding the recovery to be a bar of the contingent remainders. But the abstract opinion of counsel, although doubtless entitled to great respect, ought not to be considered decisive, unless where they have been so far acted upon as to produce such a number of titles depending on them as would render it highly inconvenient to depart from them; and this leads to an inquiry with which I shall conclude this opinion already drawn to an inconvenient length; how far titles would be affected by establishing the doctrine I advocate.

I think it may be safely asserted, that no case can be found, even including the present, where a common recovery was suffered with a view of barring a contingent remainder on the ground of the recovery being a forfeiture of the particular estate. In all the instances produced, except one, in which the title has been examined, the interest intended to be barred, I take it to be conceded, was an estate tail. In the case of captain *Cooper's* will the nature of the estate is doubtful. In *Dunwoodie v. Reed*, it is well known that the recovery was suffered under a belief that the tenant was seised in tail. Whence then the danger to titles? If there were at an early day, a few cases of contingent remainders depending on an estate for life, where recoveries were suffered on a supposition that the tenants were seised in tail; these would be protected by the statute of limitations: and if there should be a few modern cases of the kind, I see no reason why a principle on which the parties did not rely at the time, should be called up for their protection. There may in fact be just as many cases of the sort where deeds have been acknowledged pursuant to the act of 1799, with a view to bar entails.

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and where there was no estate tail in the case, but an estate for life with a contingent remainder depending on it; and yet in *Findlay v. Riddle*, that never entered into the head of the court as a reason why such proceeding should be a bar. In the very case before us, nothing would be lost by protecting the contingent remainder if the question turned on this point, for the *Hamilton* family would get the property back with the improvements, after having received its value thrice told. A court should make large sacrifices of principles to convenience, where a great number of titles would be unsettled by the decision of a question in a particular way; but we should have a motley system of patchwork indeed, if the principles of the law were to be wrested or bent to obviate every inconvenience that may be felt in a single case, or even in a few cases. Even courts of equity are governed by general rules which are sometimes inadequate to the doing of exact justice in particular cases. There can be no rule for the application of the argument *ab inconvenienti*; but every court must in that respect be governed by a sound discretion, on a view of the whole ground; and here I discern no consequences from the doctrine I advocate, calculated to create alarm. I am therefore of opinion that there are no circumstances subsequent to the act of 1750, which require that it should now receive a different construction from what it ought originally to have received.

Although this opinion may be received as a legal heresy by the profession, particularly in this city, I do not regret having expressed it; and having stated the reasons which forced my judgment to adopt it, I leave it to its fate. At the worst however it will not I hope be thought to spring from sentiments of hostility to the *English* common law. No freeman would hesitate to prefer the hardy features of personal independence of this most excellent system of jurisprudence, notwithstanding the subtlety of its forms and the tediousness of its administration, to the civil law, the code of continental *Europe*, under which justice may be unceremoniously snatched by the hand of power. It is one of the noblest properties of this common law, that instead of moulding the habits, the manners and the transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvements of the age. There are undoubtedly principles of remote antiquity which are foundation stones, and cannot be removed without destroying the beautiful and commodious modern edifice erected on them. But common recoveries are not a foundation stone. They were no part of the original plan; but were introduced and not very skilfully managed to repair an injury from a violent innovation by the legislature. In this state they have been successfully separated from the structure, and might be entirely dispensed with: but as to a certain extent they undoubtedly exist, with their rotten parts cut away, I am for allowing them exactly the effect which it seems to me the legislature

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intended they should have, the effect of barring estates tail, and no further.

DUNCAN, J. The case stated presented to the view of the court one single, abstract proposition; and that was, did a common recovery suffered after the passage of the act of 1749—50, by tenant for life, with contingent remainders in tail, destroy these remainders? The doubt arose from the division of this court in *Dunwoodie v. Reed*; in which I did not sit, being of counsel in the cause. I will proceed to consider the case as if it still depended on that proposition; and then consider it with relation to other views which have been taken of the will of the testator, the nature of the estate devised, the state of the family when the recovery was suffered, and the acts of *James* and *Andrew Hamilton* subsequent to the recovery.—Did not the divided state of the court impose on me the indispensable duty, I would have declined giving any opinion, because of my concern, as counsel, in *Dunwoodie v. Reed*, and because I held the obligation of the party against whose claim the decision was, for a fee depending on its successful result; which had not been abandoned, though it had not been renewed by suit. The obligation I had cancelled, to relieve my mind from any sordid consideration; and I trust I have brought it unbiassed to the decision. At least I have honestly endeavoured to extinguish every former impression; and from the result of a very patient and laborious examination, my only apprehension is, that instead of producing a bias in favour of a claim I had much at heart, that circumstance may have produced a bearing against it: and from the peculiarity of my situation, deciding, as I may say, alone, on property of immense value in the cause, but deciding likewise a principle which involves a great mass of property held by others on a similar title, whom we understand, and whom we see, anxiously waiting the event of the cause; and settling a general principle as to the nature of tenures, affecting the whole landed interest of the state, placed in the conflict of opinions, between the Chief Justice and my Brother GIBSON, (whose opinion I unfeignedly respect,) and where I must differ from one of them, in the state of sole arbiter, I feel most sensibly the duty I have to perform. But my burden has been greatly lightened and my task smoothed, by the very full and able discussion of the counsel on both sides; who have omitted nothing that could shed light on the question, and have pressed every topic on the attention of the court, with a strength of argument that instructed, and an ingenuity that charmed and elevated. They have drawn from the darkness, in which it was buried, into light, much of the early legislative history of *Pennsylvania*, on the reception of the common law, as the basis of our tenures, and much of its judicial history. It would be a work of labour and of difficulty, for any judge to state what parts of the common law the colonists did bring with them. Some parts of the common law and of the statutes of *England* were never used here; some of both

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laws were supplied, modified, and altered by legislative acts; and some were rejected in use, as inconsistent with the policy of a newly settled country. Those which the silent legislation of the people abrogated by desuetude, as well as those which were altered and repealed by the actual legislation of their delegates, have not any binding force.

Our present inquiry is more confined: Was the doctrine of entails, with all its incidents, remainders vested, contingent, and cross, with all their appendages, and all the *English* statutes regulating executory devises, and shifting uses, of later origin, the rule in *Shelly's* case, with all its deductions and consequences; the rule that inheritances cannot ascend, because like lead, must descend, because, as Lord *Coke* gravely observes,—the father and mother are not of the blood of their child, but the uncle and aunt are,—are all those received, introduced, and adopted? Were all the grants of lands in free and common socage, according to the common and statute laws of *England*? If these things be so, then did our ancestors bring with them the bane, *entail*; so little suited to their condition, so repugnant to their whole scheme of government, and so inconsistent with the simplicity of their private manners, and leave behind them the *antidote*, common recovery.

Has perpetuity, which in *England* has been denounced as born under an unfortunate planet, as too aristocratic for their monarchy, found a refuge in this land of freedom? It would be strange if this were so. But it is not so. In my humble judgment, entailment was agreeable to the usage of *Pennsylvania* from its first settlement. This is proven by laws, by records, and by facts. The only circumstance from which a difficulty could be made, is an act of assembly of the 11th *March*, 1683, entitled “Forms of Estates of Inheritance, or for life, lives, or years.” This act gives a short and simple form of conveyance for estates of inheritance to the grantee, his heirs and assigns; and declares, that for avoiding long and tedious conveyances, and the many controversies that may arise about variety of estates, all grants of estates shall be either of inheritance, or for life or lives, or for years, not exceeding fifty. 1 *Dal. St. L. Appendix*, 27. This appears like a putting down of estates tail by grants,—but does not touch devises. Nor does it appear how long it continued in force. It certainly was not in force in 1705: a very striking proof of the opinion of the first settlers, how inconsistent restraints on alienation were with the policy of our infant settlement. It would be some time before any thing could be found, respecting estates tail in the first generation. They would not be often questioned, nor would there be frequent occasion to use common recoveries,—nor perhaps among the first settlers were lawyers found competent to prepare the apparatus and machinery to conduct them. From what we have seen of the judicial proceedings among the first settlers, there would not appear to have been one expert in

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the law, nor would any of that profession be considered as a desirable acquisition among friends, in the early days of the settlement; nor would he have found the practice a very profitable one. It is remarkable, that at so early a period we should find legislative recognition of estates tail; and that the recognition of common recoveries and of estates tail should be coeval. The act of 1705, for better settling estates, (*Weiss's Ed.* 1st vol. 25,) only regulates the descent of lands where the father died seised, and might dispose of them by will. It left estates tail, and all other cases of descents, as they were at the common law; and an elder brother by that act succeeded to the estate of his younger brother, who died intestate of full age, unmarried, in preference to other brothers and sisters. *Lessee of Sauder and others v. Morningstar*, 1 *Yeates*, 313.

The case was one of descent of entailed lands, and the court observed that it was now too late to stir the point, whatever reason there might be before for a contrary rule in the first instance, that the invariable opinion of lawyers—since the act of 1705—had been, that entailed lands descended according to the course of the common law, that it had been understood generally, *that it had been so decided at an early day*, that all the common recoveries had been conformable to this principle; and to unsettle so many titles at that day would be productive of endless confusion. This was a decision at *nisi prius* by Chief Justice M'KEAN and Mr. Justice YEATES, judges of great experience. Indeed Judge YEATES possessed more knowledge of the usages in the country, than has fallen to the lot of any other man; and it is a very notable coincidence that this act, which left estates tail to descend *secundum formam doni*, was passed at the very same session that an act passed, putting it in the power of tenant in tail, by any deed, or conveyance acknowledged and recorded to dock and bar estates tail, and enacts, "That such deeds and conveyances should be of the same force and effect here, as fines and recoveries at common law, or deeds of feoffment, with livery of seisin, or deeds recorded, in any of the courts at *Westminster*." 1 *Dall. St. L. Appendix*, 39. There are three observations taken by the editor from some early edition of the laws, subjoined in a note. 1st. This act continued in force for eleven years. By the minutes of assembly of 2d of 11th month, 1710, it appears, it was then repealed, and an order made for bringing in a new bill to amend the former. 2d Observation. Deeds made in pursuance of the act, whilst in force are sufficient bars to estates tail. 3d Observation. On the 20th of 12th month, 1710, a new act was passed, in which there is a clause of the same import with this act, which act continued in force until the 20th of 12th month, 1713; when it was repealed by order of the Queen in council. It would be unaccountable, when we find the provincial legislature so anxious to avoid perpetual entails, and

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loosen restraints on alienation, that they should leave the owner without any mode to accomplish an end so much desired, from 1713 to 1750,—37 years.

This anxious legislature is far from discovering a design to abrogate the common law recovery. It confirms its existence and use, it provides a more expeditious and less expensive instrument; and instead of the cumbrous and complex machine then in use, common recovery, gives to the people an opportunity of using a common household implement, which the meanest capacity could comprehend, and the most common scrivener prepare, leaving to such as chose it, the common recovery as it stood, which many now use instead of the conveyance of the act of 1799; considering that in some cases it might accomplish something unattainable by that mode. Of the effect of the conveyance under the act of 1799, in not creating a forfeiture of a life estate, and destroying contingent remainders, I give no opinions at present. I neither assent to, nor dissent from the *dictum* of the Chief Justice in *Dunwoodie v. Reed*. That the affirmative act of 1705 implied a negative of the common law, or that the act of 1749—50 impaired its effect in any respect, I am far from granting. As well might it be contended, that the act of 1799, giving a new remedy to tenants in tail, took away the common law recovery, and its recognition in the act of 1749—50. This is not only contrary to the general understanding, but is directly in the teeth of the report of the judges of this court, on the *British* statutes to be incorporated into our laws. The act of 1705, and 1799, give different remedies: the act of 1749 gave the same remedy. But if it were even a different one, still the common law recovery would be in full force, and a party would be at liberty to use one or the other as pleased himself. It requires negative words to take away a common law remedy, or a common law right; or provisions so inconsistent with the previous law, as to manifest the clear intention of the legislature. Let us illustrate this by one or two examples: The compulsory arbitration act gives a new form of writ, on contracts verbal or written: it gives a form of statement, as a substitute for the common law declaration. But this provision does not take away the common law writ, and the common law declaration. The same act, whose object was, as the title shows, “to regulate proceedings in courts of justice,” gives a new form of writ in ejectment, but it provides *that all writs of ejectment shall be in the form following, and not otherwise*. In the first case, it has been decided, that notwithstanding this provision, the defendant may pursue the old form of action if he thinks proper, and is not debarred of the action of debt. *Miles v. O’Hara*, 1 *Serg. & Rawle*, 32. Yet in ejectments the new-prescribed form must be pursued. Mr. *Wharton* in his very valuable work, has arranged this case very properly under the head of Actions. *Tit. Election of Actions, Whart. Dig. 3*. But this is no new doctrine. It is an obvious principle in the construction of statutes, that they are never pre-

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sumed to make an alteration in the common law, further than as the statute declares; and where there is a right at common law and the statute takes away that right, it is to be construed strictly, and is not to go beyond its very words. 1 *Dall.* 66. 11 *Mod.* 149. 10 *Johns.* 579. For in all general matters, the law does not presume any alteration intended by the act further than is expressed. Hence it is, that the intestate acts, though in their provisions very general, do not comprehend estates tail. In one of the first editions of the acts of assembly, there is a note to the charter to *William Penn*, observing, that although it should be made a question whether the statute laws of *England* did not extend to this province by the charter, yet as the common law is generally allowed to be in force in such cases, where no alterations have been made by act of assembly, and it appears to have been resolved in the Earl of *Derby's* case, 4 *Inst.* 284, that lands granted by letters patent from the Crown, though out of the realm of *England*, should descend according to the course of the common law, (1 *Dall. St. L. Appendix.* 261,) so lands in *Pennsylvania* descend according to the same course. Even in penal statutes this construction obtains; for, where a statute creates a new offence, and points out a particular punishment, and a specific mode of recovering the penalty which it inflicts, that particular method must be pursued: but where the act was antecedently punishable by a common law proceeding, and the statute prescribes a particular remedy by a summary proceeding, there either method may be pursued; and the prosecutor is at liberty either to proceed at the common law, or in the method prescribed by the statute; because there the action is cumulative, and does not preclude the common law. *The King v. Robinson*, 2 *Burr.* 799. In the act for "regulating proceedings in courts of justice," before referred to, the legislature provided, "that in all cases where a remedy is provided, or duty enjoined, or any thing directed to be done by any act of assembly, the directions of the acts shall be strictly pursued, and no penalty shall be inflicted, or any thing done agreeably to the provisions of the common law, in such cases, further than is necessary to carry the act into effect." Here is a recognition of cumulative, statutory, and common law remedies. This act has been considered not to touch civil actions, or remedies for civil rights, and is confined to penal inflictions merely. In *American* legislation, when a term of the common law is adopted, the common law meaning is adopted with it. To know what the common law was before the making of such statute, is the very lock and key to open its windows, and it is always considered the best interpretation of statutes, to construe them as near the reason and rule of the common law as may be. Common recovery is above all others a term of art, has a technical signification; and even in the construction of the constitution of the *United States*, this rule prevails with relation to terms of art, and that even in the highest offence,—treason. The question on the trial of *Colonel Burr*, 4

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Cranch, Appendix, was on the meaning of the term, *levying war*. Chief Justice MARSHALL observed, "It is not for the first time applied to treason by the constitution of the *United States*. It is a technical term: it is used in a very old statute in that country, whose language is our language, and whose laws form the *substratum* of our laws. It is scarcely conceivable, that the term was not employed by the framers of our constitution, in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context." The act of 1749 gives to common recoveries not only their common law effect, but all their effect under the statute law; that is, the statute of *Elizabeth* and other statutes declaring covenous recoveries by tenants for life void. That act likewise makes them void. There was the same law of entailment, the statute *de donis* in full force here, the same mode of destruction, by an instrument of the same name, with a declaration that whatever effect it should have in the mother country it should have here, whose common law was our common law, guaranteed to *William Penn*, and his followers, by the charter, insisted upon by the representatives of the people as their birthright; not considered a badge of slavery or a yoke of oppression, but the palladium of their privileges and charter of their rights. And this position judges must treasure up in their minds; because, when called upon to decide questions of *meum* and *tuum*, it is their only sure guide. All lands in *Pennsylvania* are held in free and common socage, and thus socage tenure is still resorted to in the nomination of guardians. The Orphans' Court in their appointments are confined to guardians in socage, or by nurture. *Graham's Appeal*, 1 *Dall.* 136.

The soil was granted to *William Penn* in free and common socage. It was so held by him, so parcelled out to his followers, and so granted by him and his successors, as will appear by every patent issued anterior to the revolution. It was an inherent principle in all new settlements, that the laws of the mother country, not inconsistent with the circumstances and situation of the infant colony, should have a binding force until altered by the new government; and that binding force arises from a necessity, which supposes that they received the laws under which they lived, before their settlement in the new plantations, and agreed to be governed by them, for want of another law. See 2 *Smith's Laws*, 106, in his very interesting article on the land laws of *Pennsylvania*. Now no one will pretend, that a law avoiding restraints on alienation of lands was inconsistent with their state; though all will agree, that the restraint itself was inconsistent. But this did not rest on the compact between the founder and his followers: it was incorporated in the royal charter. "The laws for regulating and go-

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verning property, as well for the descent and enjoyment of lands, as the succession and enjoyment of goods, &c. shall be and continue the same as they shall be for the time being, by the general course of the laws of *Eng'and*, until the said laws shall be altered by the said *William Penn*, his heirs or assigns; and by the freemen of the said province, their delegates or deputies, or the greater part of them."—It is plain, that from the date of the charter until laws were made to alter the succession, lands descended according to the course of the common law; and not only descent, but enjoyment and purchase, including every other mode of acquisition, were governed by that law,—acquired and lost by the course of the same common law. In one word, in general, the common law has been in force in *Pennsylvania*, (1 *Dall.* 67:) and common recoveries as a part of that common law. There was a day in this state, when this would not have been a popular doctrine with many. For some men, with very honest views, under the name of improvements were prepared for dilapidation: but the people, with the voice of the barons of old, exclaimed *nolumus communem legem mutare*. The provisions and institutions of the common law are more entitled to respect and veneration from their age and utility, better calculated to increase the happiness of individuals, secure their liberty and property, and promote the general welfare, the legitimate ends of all governments, than the institutions of any other country, with all their boasted codes and codifications, so much applauded by some for their terseness and brevity. The true proposition is, that the common law is general and fundamental; and, unless where the common usage of the country has changed it, or it has been altered by acts of assembly, it is the inexhaustible fountain of justice from which we draw our law. It is sometimes asked with a sneer What is the common law of *Pennsylvania*? I answer unhesitatingly, So much of the common law of *England*, and their civil institutions, as our ancestors brought with them, and of the statutes then in force altering or amending it; such of the more recent statutes as have been since adopted in practice, and the ancient usages, may be considered as forming the body of the common law of *Pennsylvania*; which has submitted to some alterations by non-usage, by acts of the provincial and state legislatures, and by provisions of the constitution of the state and of the *United States*.—This definition has no claim to originality: it is collected from the judicial opinions of the courts throughout the union, and the express enactments of our own legislature, I mean the act of 1777, (one of the first acts of legislation of the state government,) which declares, "the common law, and such parts of the statute laws of *England* as have been theretofore in force, to be in as full force, as if they had then been enacted:" the act requiring the judges to report what *British* statutes are in force, and the act of *March*, 1810, prohibiting in courts of justice the reading or quoting of *British* precedents or adjudications, subsequent to the 4th of *July*, 1776, than which

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nothing can be a stronger recognition of the general authority of the common law.

Our ancestors emigrated with sentiments hostile to restrictions on the transfers of land, and impressed with the mischiefs of entail. They struggled hard to set them altogether free, and passed act after act, putting it in the power of tenant in tail *to aliene* as tenant in fee by a prescribed form of conveyance. We cannot suppose, that they peevishly or wantonly renounced the power of unbinding them altogether, because they would not be suffered to untie them, in their own way: which was not finally accomplished, until the act of 1799. So much had the people set their hearts on this, that the convention who framed the constitution of 1776, enjoined it on future legislatures "to regulate entails in such manner, as to prevent perpetuities." The best account of the mischief of estates tail, and of the remedy of common recovery, is in the opinion of Baron MANWOOD, in *Sir William Pelham's Case*, 2 Leon. 66. "Tenant in tail," he observed, "might, by the common law, aliene his lands *post prolem suscitata*, and now he hath an inheritance, and may do waste, but he was so restrained by the stat. of *Westminster* 2d, that all the realm and all the subjects in it, were inveigled thereby. Jointures of wives, leases, mortgages, and other securities, were defeated, by the death of tenant in tail, which was both against the common law, and against all conscience. These matters coming to the knowledge of the justices, and the mischiefs thereupon following being very frequent, and it appearing that tenant in tail was a *dangerous fellow, and that there was no safe dealing with him*, they considered with themselves, that lineal warranty and assets, and collateral warranty without assets, did bar the entail. Upon this consideration, they grounded the practices and usages of common recoveries, so as by that means, tenant in tail hath *potestas alienandi*." Not again to turn to this case, the subject of forfeiture by tenant for life, suffering a common recovery, is fully treated, and the Baron gives many instances where such forfeiture arises. Tenant for life joins the mise upon the mere right; lessee for years being ousted, brings an assize and recovers, accepting a fine of a stranger *comme ceo*, &c. all these are forfeitures. He answered the objection, that the recovery being void by statute could not affect the tenant in tail thus. As to what hath been said of the forfeiture, and that the recovery should stand in force, until the death of the tenant for life, and in our case the tenant is alive, truly, if the law should be such, great mischief would follow. For jointresses having assurances to them, of great and stately houses, and of lands furnished with timber, and of great yearly value, might suffer such recoveries, and having plucked the fee out of the heirs, might commit waste, and should be punishable, which would be intolerable mischief, and so concluded that a recovery by tenant for life was a forfeiture. But it is said, there has been no usage of recovery at common law. The very

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act of 1749 proves the usage of this common law right and privilege *proprio vigore* and without the aid of any act of assembly, from 1713 to 1749. It declares prior common recoveries to be valid: but this was no acknowledgment that they required such aid. Provisions of this kind are frequently used. They are introduced, *ex majori cautela*, and prove nothing here. Fines, though seldom if ever used, are still recognized. The judges in their report, introduce several *British* statutes, regulating fines, as obtaining in *Pennsylvania*; particularly, the statute *de modo levandi fines*. In conveyances, usage introduced a mere acknowledgement of a feme covert, and when this was questioned in courts of justice, it was confirmed on the principle of *communis error facit jus*. From 1744 to the passing of that act, there are found three common recoveries suffered in the city and county of *Philadelphia*. In the other counties, there has been no search. Whether there was, at that early day, in *Chester*, *Bucks*, or *Lancaster* counties, any lawyer sufficiently skilled to conduct them, I know not: but in the city and county, we find the only distinguished members of the bar, the attorney general Mr. *Francis*, Messrs. *John Ross*, and *Moland* passing them. When we find such proceedings carried on by such men, and admitted of record, as judicial acts, by a court having jurisdiction in all actions, real, personal and mixed, it forms the only conclusive evidence such fact is capable of, irrefragable evidence, whose verity cannot be questioned. For no man can deny, that *defacto*, these recoveries were suffered. How weak was the evidence of the use of trial *per medietatem linguæ* proved by one witness to have been used in one instance, compared with the undeniable evidence by record? and if the validity of any one of these three recoveries, at the end of nearly eighty years, without the benefit of the protecting clause in the act of 1749, was now called in question, I would not be the judge to pronounce them all nullities, and that all these solemn acts, advised; conducted, and guided by all the respectable men of the profession, recorded and acted upon in courts of justice, the property transferred again and again, improved and built upon, and now of a hundred fold more value, were nothing but assumptions of power, *coram non judice*, and no title acquired under them. Higher and better evidence could not exist. But in addition to all this, we have the declarations of Chief Justice M'KEAN, and Judge YEATES, in *Sauder's Lessee v. Morningstar*, before referred to, that to unsettle so many titles held by them, would be productive of endless confusion. This was never called in question, until the decision in *Dunwoodie v. Reed*, unless in the statement of Chief Justice SHIPPEN, and certainly every thing that fell from that venerated man, is entitled to great respect, and it is not to be wondered at, that confiding in this statement, as all would do, it would produce erroneous opinions. But the Chief Justice there showed, that either there was mistake in the statement, or misconception in the repor-

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ter, and this has been more abundantly proved on this argument. The usage in the courts of confessing a judgment against the testator, and selling his land to dock the entail, was an expedient resorted to, perhaps, by country practitioners from ignorance of the mode of cutting the *Gordian knot* by common recovery, and therefore cutting it by a sheriff's sale. This silence on the exercise of so great an authority, in the use of a common law remedy, the only one which existed to cure the crying mischiefs of estates tail, is of itself powerful evidence of its legal foundation, though nothing can be found in any book respecting it; just as the total disuse of any institution for ages past, would afford just and reasonable objections against the enforcing superannuated ordinances. 1 *Woodson*, 63. This usage does not require the same strict evidence that is required to prove a particular custom in derogation of the common law, which is a general custom, but it has all the ingredients of a particular custom. It is immemorial, that is, one of the primitive usages of the province. Continued, peaceable, reasonable, certain, and consistent, *semper usitata and probata*. It is not a sound position, that to establish the reception of any part of the common law, it must be proved when and where and on what occasion, and by whom it was adjudged. If I were asked, in what cases it was adjudged that a limitation to a man and his heirs gave him a fee simple, I should be as unable to answer as Lord HALE was, when the same question was put to him. Who before the decision of *Eshleman v. Hoke*, could point out a case in which it had been decided, that collateral warranty, with sufficient real assets descending to heirs, will bar them from recovering the lands warranted? Yet this was the opinion of the court, on a special verdict; not a hasty decision at *Nisi Prius*, but where time had been taken for deliberation. 2 *Yeates*, 504. 4 *Dall.* 168. But the proof of the negative should be on those who allege the exception, and it is susceptible of ready proof. For instance; to prove that in this state, the wife will be endowed of a trust estate, the husband entitled to be tenant by the curtesy, though no actual seisin of the wife's lands, if they be uncultivated lands. I know not whether it has gone to a case of actual adverse seisin: the constructive seisin of wild lands, not obtaining where there is an adverse possession. 8 *Johns.* 262. Where there is an adverse seisin, in *Connecticut* it is held, that the wife's right to possession will entitle him. 4 *Day*, 298. Nor has the rule, that descents toll entries, or that one cannot grant or devise lands, where the seisin is adverse, seisin being necessary by the feudal law in order to the investiture of possession, being inconsistent with the state of a new country, been ever used here. *Ownership gives the right of alienation.*

The course of the offices, and a variety of precedents form strong evidence of the law; but here are the judicial opinions of Chief Justice M'KEAN, Chief Justice SHIPPEN, Justices YEATES and BRADFORD. Chief Justice M'KEAN, not only in *Sauder's Lessee v.*

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Morningstar, but in *McKee v. Pfoutz*, directly admits, that feudal ceremonies in relation to descents and transmissions of property, prevailed here. He says "the legislature has, at various periods, and on a variety of subjects, departed from feudal principles and ceremonies, in the descent and transmission of real property;" clearly showing, that where the legislature had not departed from them, they continued the law of real property: and Judge SHIPPEN admitted the feudal principle of forfeiture, by feoffment or deed of record. The weight of practice, of jurisdiction exercised, of the opinions of all the sages of the law, is not to be compared to the mere usage of conveyancers. Yet so much respect is paid to their practice, that courts of justice will not overturn the universal opinion and usage of eminent conveyancers, though not founded in principle, as it might render titles precarious. *Sugden*, 288. In *Basset v. Basset*, 3 *Atk.* 298, the chancellor said, that the uniform opinions and practice of eminent conveyancers, has always had great regard paid to it, in courts of justice, and the case of *Radnor v. Vandebender*, *Shw. P. C.* 69, was determined on the point of dower, entirely from the opinion of conveyancers on the deed. The common law of common recoveries is the common law of *Pennsylvania*. Are contingent remainders acknowledged by our law? For if they are, they must partake of the destructible quality which their very name impresses on them. That such things are, was not denied in *Dunwoodie v. Reed*, and if they are, they must require a particular estate to support them. They cannot live in the air, or be dandled in *gremio legis*, until they are ripe for enjoyment. They hold life by a most attenuated thread. Take away this prop, and they drop into the grave, or rather, their potentiality of future existence is annihilated. Present existence they have none. They never were in *rerum natura*; and this prop may not only be removed by the forfeiture of tenant for life, but is subject to the accident of the consolidation of the two estates, for life and in fee, by merger, which may happen by act of the parties, surrender by tenant for life to him who holds the ultimate fee, either by way of remainder or reversion, or by act of law, mediate descent. For whoever and whatever avoids the first estate of freehold, avoids remainders expectant on this estate, whether it be by act of tenant for life, or act of law altering the particular estate in quantity of interest; for it is not the same estate, whatever may have produced the alteration. This imperfect and suspended state is one of the substantial differences between contingent and vested remainders, 2 *Bl.* 173; and this contingent remainder, with this mortal infirmity, was received as the common law of *Pennsylvania*, in *Evan's Lessee v. Davis*, 1 *Yeates*, 332, where the only question made was, whether the remainder to *Abel James*, was vested, or contingent; for it was admitted by the counsel for the plaintiff, and for the defendant, that if the particular estate determined before the contingency happened, the contingent remainders were destroyed. The

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counsel for the plaintiffs were *E. Tilghman*, *Wilcocks* and *Lewis*; for the defendants, *Sergeant*, *Ingersoll*, and *Coxe*: of whom it may be said without disparagement to their successors at the bar, that they were not excelled by them, in their knowledge of this branch of the law. Chief Justice M'KEAN, Justices SHIPPEN, YEATES, and BRADFORD, were all of this opinion. This case establishes incontestibly at least two points. One, that such things as contingent remainders are common to our laws; and another, that they are determined by the destruction of particular estates. It goes far to establish a third point, that common recoveries will produce this effect of forfeiture and determination of the life estate, on which a contingency depends. Judge YEATES decisively, the other judges by strong implication. Judge YEATES, observed, that "the only question was, whether the remainder to *Abel James*, was vested or contingent. The particular estate of *John Parrock*, being determined by his attainder, the contingent remainder is gone and the commonwealth should have the fee, discharged of all remainders;" and this on the principle, that the deed from the state to the purchaser operated as a common recovery. The state, like the king, could not suffer a recovery, for conveniency, decency, and order. The decision of the late President WILSON, in the case of *Ratton v. Cornish*, is directly in point, and though not binding on this court, yet it was the opinion of a judge who seldom took up hasty opinions, and whose legal knowledge, great discretion, and sound judgment are held in high and deserved respect. But the multiplication of proof is extraordinary. The report of the judges on the English statutes in force, is conclusive, for it recommends the incorporation by act of the legislature of all the British acts of Parliament respecting common recoveries. Now most of these avoided collusive recoveries suffered by tenants for life, and if the effect of a common recovery by the common law by the act of tenant for life was adopted by the act of 1749, these acts would be nugatory, and without any subject to operate on. But when a moment is occupied in comparing the provisions of this act with a definition of a recovery at the common law, there will be found such exact and literal conformity, as to satisfy the mind that the legislature, having this definition in their view, intended the common recovery in its height and length and breadth to be the same artificial thing with all its proportions and with all its vigour. By that act, a common recovery is to be suffered according to the course of the common law and statute laws of England, of lands entailed and shall have the same form and effect for barring estates tail. The argument is that this *act* forbids any other than a tenant in tail from suffering a common recovery. So likewise do the British statutes, by declaring collusive and void common recoveries suffered by tenants for life. So, the common recovery, though it has the form of a suit at law, and the effect of a judgment at common law, yet the whole transaction is one common assurance, and the recovery is a creature

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and instrument of the tenant in tail for whose benefit the recovery is suffered. In *Taylor v. Horde*, 1 Burr, 60, Lord Chief Justice WILLES, justly says, that “Mr. Piggot has confounded himself and every one who reads his book, by endeavouring to give reasons for, and explain common recoveries; and whoever does so on any other principle than that they are common assurances, will run into absurdities.” *Willes*, 75. And in page 451, the instrument is thus defined: “It is a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate as if he were tenant in fee:” and Sir *William Blackstone*, 2 *Bl. Com.* 361, defines a common recovery to be “a formal mode of conveyance, by which tenants in tail is enabled to alien his lands.” This conveyance invented for the sole purpose of docking estates tail, yet destroys the particular estate of a tenant for life, and is not like an innocent conveyance by bargain and sale, as in *McKee v. Pfoutz*. And why is it, that common recovery forfeits the life estate? Because it is a solemn assurance of record, and from its notoriety, is equal to a feoffment and an investiture *coram pares*. But what puts the forfeiture beyond doubt is, that *James* being vouched and disclaiming of record, he lost his estate for life. *Coventry on Recoveries* 54. And this may distinguish common recoveries from bargains and sales as to the forfeiture, and tend to support the opinion of the *Chief Justice* as to the effect of a conveyance under the act of 1799. The reasonableness of the doctrine of forfeiture and rewarding tenant for life by giving him a fee is objected. This is confounding two things. Tenant for life, does not acquire the fee simple by his tortious act. He loses his life estate; he gains nothing. It is only where he has the reversion, that, by the destruction of the contingent remainders he becomes a gainer. The forfeiture is a punishment on tenant for life for his disloyalty. The consequence is a different matter. There he is entitled to the reversion.

It is this that brings the doctrine to the test of common reason. A man makes a disposition of a remainder or future interest, which is to take no effect until a future event or contingency happens. It is admitted, that no interest passes by such disposition to any body, before the event referred to takes place. The question is, what becomes of the intermediate reversionary interests from the time of making such future disposition until it takes effect. It was in the grantor or testator at the time of making it. It is confessedly not included in it. The natural conclusion is that it remains where it was, viz in the grantor or testator, and his heirs for want of being parted with to any body else. When the future disposition takes effect, then the reversionary or *future* interest passes, pursuant to the terms of it. But if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there then to draw the estate, which was the intended subject of it, out of the grantor or his heirs, —or the heirs of the testator;—or who can derive title to an estate

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under a prospective disposition, which confessedly never takes any effect at all. *Fearne*, 364.

The reason of many rules of property has ceased, and yet the law remains. The rule in *Shelly's* case, that unbinding and inflexible rule, as some suppose it, which bears down all before it, converting an estate for life into an estate tail, is of feudal origin, yet it continues a rule of property, an unbroken pillar of the common law, not to be demolished or thrown by with the rubbish of the dark ages. *Smith v. Chapman*, 1 *Hen. & Munf.* 300, 3 *Binn.* 164. *Findlay v. Riddle*. It has been remarked by a very celebrated author, eminent for his great endowments in almost all sciences, and considered an able jurist, "that nothing is law, that is not reason, is a maxim excellent in theory, but dangerous in practice. The reason of *Titius* may be different from that of *Septimius*. No man who is not a lawyer would ever know how to act, and no man who is a lawyer know in many instances what to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate." *Jones on Bailments*, 46. It is my wish and my comfort, said a very learned judge, "to stand *super antiquas vias*, to tread in paths, *quæ relictæ sunt et traditæ*. Those who are confident in their superior abilities may, perhaps, fancy that they could erect a new system of laws, less objectionable than that under which they live. I have not that confidence in mine; and am satisfied by the decisions, and series of decisions of great and learned men, on the rules of law under which the landed property of this country is now held, and it is my duty, as well as inclination, to give effect to these rules. I cannot legislate, but by my industry, I can discover what our predecessors have done, and I will tread in their footsteps. Authorities established, are so many laws, and receding them unsettles property. Established maxims as to the legal effect of the different modes of conveyances, will render the decisions of titles as little dependent as the nature of things will admit of, on the occasional opinions, humour, ingenuity, or caprice of the judge, and are, therefore, the most proper and sure grounds to rest and depend upon. For the judgment being guided by fixed and known rules, will not be liable to the temporary influence which must necessarily have a share in directing the decisions of every court upon earth. No room can be left to litigate on disputed titles, built on such a stable foundation. Titles so familiar, may be clearly and easily ascertained, and under them a permanent and pacific enjoyment may be inherited. *Fearne on Cont. Rem.* 170.

Insecurity of titles, as we have experienced in the controversy between the actual settlers and the warrantees, tends much more to clog the circulation of property, and impede the settlement and improvement of the country, than even obstructions growing out of perpetuity. On what foundation does the whole doctrine of common recovery stand, which takes away the estate, that the sta-

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tute *de donis* meant to be unalienable from the issue in tail? On the ground of receiving a recompense? On what ground of reason, the rule of collateral warranty, either with, or without assets descending on the heir, which stripped him of his estate, but some rigid rule of law? These rules may sometimes press hard on individuals, yet are, notwithstanding, the laws of the land, and it is an answer to all this objection, to say, *ita lex scripta est*. Courts, says Judge PATTERSON, in the discharge of the judicial function have often occasion to exclaim *durum, valde durum est, sed ita lex*. Contingent remainders, liable to extinction by the determination of the estate on which they depend, and whose support they require, being received as a rule of law, it must continue to be so while the subject of it exists, until altered by some solemn act of legislation. It cannot remain unregulated, subject to judicial discretion, until the legislature should make a law respecting it. For this would open a door to all the uncertainty, confusion, and disorder, which laws are made to obviate and prevent. *Fearne*, 88. I, however, am free to confess, that my mind is not troubled with any compunctious visitings, and had I not been fettered with authority, I have no wish here, if wishes could be indulged, to give effect to the posthumous family pride of this testator. Nor do I think it any breach of duty in *James* and *Andrew Hamilton*, to endeavour to come at the inheritance by any mode the law will allow of: and if the respectable testator was permitted to revisit this world; this property and its present state, and the present state of the family whom he intended to provide for, he would rejoice to find, there was discovered an expedient in the law to disappoint his vain design that his estate should not be inherited by any human being who breathed the same air with him, and defeat his proud view of aggrandizing some unknown son of an unknown ancestor, at the expense of all his living representatives. But the consideration has not weighed a feather in the construction I have given to the effects of a common recovery. When at the bar I had fallen into errors; perhaps, led astray by the apparent unreasonableness of the rule, and confirmed in this error by the misapprehension of the principles on which *M'Kee v. Pfoutz*, was decided. For, at the time it was generally understood, that the same doctrine would apply to common recoveries, and this error was strengthened by the narrative of Judge SHIPPEN. From the very full discussion, for the arguments have certainly included every thing that could be said on both sides of the question, from the decisive evidence of the use of common recoveries at the common law before the act of 1749, and a conviction that the act of 1749, as well as the act of 1799, left their effect unimpaired, and on a patient investigation, after much reflection, I acknowledge my error, and am now as fully satisfied, that a common recovery suffered by tenant for life, determines his estate by forfeiture, and destroys all contingent remainders dependant on that estate, as that a grant to a man and his heirs, gives

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him a fee simple; and I am as far from thinking that it is quite so sure, that the rule was without good reason, as that the reason has ceased. The necessity under the feudal system, that there should be always some one ready to perform the lord's services, was not the only reason which introduced the maxim of the common law, that the freehold can never be placed in abeyance. It had a better foundation which continues still to exist, and to exist in *Pennsylvania*, that there should be always some person to answer the real action, brought for the recovery of the property. Grants which would place the freehold in abeyance, or delay a suit, or after any short interval, cease the estate to one person, and then give it to another, and so *a ternis vicibus*, would be most pernicious. A person who has a right of action, would in one case, dower, be defeated altogether, and in another case, partition, be greatly delayed, and the policy of the rule which denies to the owner the power of putting the freehold in abeyance, is, in fact, effectually attained by the rules applicable to contingent remainders, by precluding them from effect, unless they vest in interest during a preceding estate of freehold, or in the same instant the particular estate determines. See 4 *Preston on Estates*, 254, 255. For if a freehold could pass to commence *in futuro*, there would be an abeyance, and want of a tenant against whom to bring a *precipe*, and the law will not suffer the land to be in abeyance a single day, if possible, to prevent this. For if it might be without a tenant for one day, why not for fifty years? *Vernon v. West*, 2 *Wils.* 165, by PRATT, Chief Justice. There are several cases in which a real action will lie in *Pennsylvania*. Assise of nuisance is one. *Livezey v. Gorgas*, 2 *Binn.* 192: *Quod permittat prosternere*, was maintained at *Nisi Prius* at *Chambersburg*: A writ of waste, in which the place wasted is recovered; but the mischief is not so great for the want of a tenant, as the party might have other remedies. There are, however, two cases which would be without remedy, dower, and partition, as there would be no tenant of the freehold, against whom to serve the writs, and they could not be against tenant at will, or for years. I know not of any direct decision as to dower in this state, but from the nature of the demand and recovery, it must be so, 2 *Bl.* 183. In *Parker v. Murphey*, 12 *Mass.* 415, it was decided, that a writ of dower lies only against him who is seised of an estate of freehold, or inheritance. The writ of dower *unde nihil habet*, is a writ of entry, which lies where the widow is deforced of all her dower. The writ of right of dower, is a more general remedy, extending either to part, or the whole, and is of the same nature as the grand writ of right. So that if dower were partially assigned, the widow's only remedy is the writ of right. But it would be difficult to support any action of dower against the tenant for years, or at will: for if it could be, he would have judgment against him for the damages also, although from the nature of his estate he could not be supposed to have ex-

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pected any such liability, nor to have provided in any way for indemnity against it. Damages in dower are given by statute of *Merton*, and the reason why the jury are to find the value of the land, in case the husband died seised, is, that the court may give damages, pursuant to the statute, from the death of the husband to the time of the judgment, and if the heir sell to J. S., and the widow recover her dower against him, he must pay the whole *mesne profits*, from the death of her husband; although he has not been the half of the time in possession. *Bull. Nisi Prius*, 115, 6 *Johns.* 290. In *Miller v. Beverly's Widow*. 1 *Henn. & Munf.* 368, it was decided, that a writ of dower *unde nihil habet*, cannot be maintained against a tenant for years, but must be brought against the tenant of the freehold. It lies only against the tenant of the freehold, *F. N. B.* 148. It is clear law, that partition will only lie against the tenant of the freehold. *Bethel v. Lloyd, et al*, 1 *Dall.* 2, and 1 *Binney* 1, *Lit. Rep.* 300. It was doubted, whether it could be supported by tenant of the curtesy. *Walker v. Dilworth*, 2 *Dall.* 257. But if the reason of the law has ceased, it is for the legislature to say the law shall cease, and Lord Chief Justice PRATT, though he acknowledged this doctrine had little foundation now to rest on, with emphasis said, "we must not overthrow the established principles of the law," and he was no slavish adherent to antiquated notions, 2 *Wils.* 169.

I may state, as a matter of judicial history, that *British Judges* regret the existence of this rigid rule, and that as they never will construe a devise to be executory, when they can construe it a contingent remainder, so, if there is any thing in the conveyance or will, by which it can be supported as a vested remainder, they will never consider it contingent. And although equity cannot interpose where there is no trust, yet it views the destruction of contingent remainders in the light of a wrong or tort, and makes every possible effort to extend its protection against them. It is said, that Lord KENYON had prepared a bill for the House of Peers, but withdrew it on some preliminary objections, in a fit of vexation. But this did not rudely remove a key-stone in the arch of the *Gothic* edifice. It filled up the vacuum, and preserved the symmetry, by converting the tenant for life into a trustee to support the remainders, *eo instanti*, he destroyed the particular estate. And there could be nothing more simple than this plan. But this is matter for legislative enactment, not for judicial decision. The present chancellor seems to doubt, whether a Court of Equity would compel a purchaser to accept of a title depending on the destruction of a contingent remainder. But the law continues the same, that if a tenant for life, contingent remainders to his first and other sons, destroys the contingent remainders, that is no breach of trust, and equity will not interpose. *Fearne on Cont. Rem.* 315. For in *Mansell v. Mansell*, 2 *P. Wms.* 678, it was resolved, by the chancellor, with the concurrence of Lord Chief Justice RAY-

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MOND, and Chief Baron REYNOLDS, that where an estate is limited to A. for life, remainder to his first, and all his other sons in tail, though it be a plain tort and wrong in him to destroy the contingent remainders before the birth of a son, notwithstanding he has legal power so to do, yet, as in this case, he is no trustee, and therefore, no trust. There can be no breach of trust consequently, and therefore, a Court of Equity may have no cognizance or handle for relief, the matter being left purely to the common law. But to prevent this inconvenience, a remedy has been invented of appointing trustees, on purpose to disable the tenant for life from doing such injury to his issue, which is not a very old invention. This solemn resolution which has been received and considered as the approved doctrine of the law, is decisive. If it is so, as it most certainly is, the effect of a common recovery by tenant for life in *England* to destroy a contingent remainder depending on his particular estate, and if a common recovery suffered since the act of 1749, has the same effect as a common recovery in *England*, as I now am of opinion it has, (I speak with great deference to Judge GIBSON, who holds a different opinion,) it follows, that the plaintiffs in the case stated, are entitled to judgment.

In coming to this conclusion, it has had its due weight with me, without, I trust, producing an improper influence or unfair bias so as to blind my own understanding or deceive my judgment, that those proceedings were advised and conducted by two gentlemen of great professional knowledge; and the purchase by the *Bush Hill* company was made on the strength of their legal opinions.—Of the survivor, and in his presence, without offence to his delicacy and the imputation of flattery, I cannot say how highly I prize his legal opinions; but I may speak of the dead with greater freedom;—of the late Mr. *Edward Tilghman*, whom it gives me pride and pleasure to say I knew long and knew well, and from whom, in my early professional concerns, I received much useful instruction.—His attention to young men in the profession, was one among the many honourable traits that distinguished him at the bar. Of him I can truly say, that I never knew any man who had this intricate branch of the law so much at his finger's end. With all others, with whom I have had professional intercourse, it was the work of time and consideration to comprehend; but he took in, with one glance, all the beauties of the most obscure and difficult limitations. With him it was intuitive, and he could untie the knots of a contingent remainder or executory devise, as familiarly as he could his garter; and his name adds, with me, some sanction to those proceedings.

The usage of eminent conveyancers has settled the forms and construction of conveyances. At an early day, they were fixed by *Bridgman*, *Palmer*, and other distinguished men. In latter days, conveyancing has become a peculiar province, and an important department of the law; and there have appeared many great men in

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that branch; *Booth*, *Fearne*, *Hargrave*, *Preston*, and others, by whose opinion and advice the landed property in *England* has been guided, either in alienations or family settlements. Their usages, though they do not make the law, are strong evidence of it, and respected in courts of justice; and though they may not agree with them in principle, yet they will not disturb or unsettle property by changing this usage.

I have employed much of my own time and reflection to understand the question; and all my humble faculties to give to this important cause, a decision consistent with the laws of the land; and I feel I have trespassed too long on the public time and patience. But the occasion seemed to me to call for a full explanation of the reasons of my present opinion, so different from the opinion it was well known I entertained, and often publicly expressed. And the wide field necessarily opened by counsel, on the whole doctrine of the common law, as applied to our tenures, and the various topics that naturally crowd on the mind in considering it, have extended my observations far beyond my original intentions; which were, to deliver my sentiments with precision and as succinctly as possible. In the latter view, perhaps in both, I have failed. I come now to consider other views which have been taken of this case, on the second argument. It is contended by the counsel of the defendant, that admitting a common recovery to have the same consequences that as in *England*, this common recovery could not produce a forfeiture of *James's* life estate: it would be innocent, and would bar the tenant's estate in *James*, leaving undisturbed all the intermediate estates.

I proceed to this inquiry, unconnected with other considerations and other doctrines, which will be hereafter alluded to. *James* the second, would be tenant for life in possession, contingent remainder to his first and other sons in succession for life; and to his sons in succession in tail male; and so to *Andrew* the second, and his sons, &c., with remainder in tail general to *James*, with remainder in interest, but not in possession, in default of all such issue remainder or reversion to the right heirs of testator. The reason why the tenant for life forfeits his estate is, because it is considered as a proper punishment for attempting an act inconsistent with his tenure, and calculated to injure those in remainder. But the law will never punish a man for doing that which is consistent with the nature of his estate, and may have a legal operation. Here *James* stood in two characters; he was tenant for life, remainder in tail in esse. This remainder in tail to himself, being tenant for life in possession, he might legally bar. He has not taken on him to do any act inconsistent with the nature of his estate; the tenant to the *præcipe* being made by bargain and sale. *Fearne*, 322. *Conventry on Recoveries*, 136. My opinion is, that the recovery, even if *Andrew* had not been vouchee, would not have been a forfeiture of *James's* life estate.

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It is clear, that *Andrew*, by being vouchee and entering into the warranty, determined his life estate; whether by forfeiture, estoppel, or cession to *James*, by the deed to lead the uses and recovery, can make no difference. There then remained in no one any particular estate of freehold to support the contingent remainders. *Andrew* had no estate which he could enlarge. It is immaterial, whether he was a necessary party to the recovery or not. If he was not, it was a disloyal intermeddling on his part. But he avowed himself to be a necessary party on the record, by entering into the warranty; and this would create a forfeiture, though he did not enlarge his own estate. The proceedings in a common recovery are considered to be in reality what they purport to be, a real action between real parties. *Andrew* appeared as a party in this real action, challenged the fee in a Court of record, warranted his title to the fee. Now a tenant for life may forfeit his estate in four manner of ways: by matter of record, by alienation by feoffment, by claiming a greater estate than he ought, and by affirming the remainder or reversion to be in a stranger. By claim; as if tenant for life, will, in a Court of record, claim a fee, implied; as if in a writ of right, he will take upon him to join the mise upon the mere right, and which none but tenant in fee simple ought to do. So, if a tenant for years bring a *præcipe* and lose, and then bring a writ of error; this is a forfeiture. *Co. Lit.* 257. If a tenant for life claim a fee, this is a forfeiture. So, if he challengeth, in a Court of record, a greater estate than he hath. See *Pelham's case*, 2 Leo, 66. For the bare attempt to do a wrongful act or unlawful thing, though void, creates a forfeiture. *Parkhurst v. Dormer*, *Willes*, 343. The question is, could *Andrew* enter on *James's* death? was he not estopped? Estoppels are of three kinds: matter of record, in writing, or act *in pais*. The acceptance of rent is of the last sort. The estoppel by record is founded on this, that what a man hath once solemnly alleged, he shall not be suffered to contradict. *Anderson's Appeal*, 4 *Yeates*, 38. If the recovery was a real proceeding, no one could doubt the estoppel. Substantially, it is a real suit. If not a real suit, it is nothing. It is a real suit, a writ against the tenant, who must be tenant of the freehold—appearance of the tenant—a count against the tenant—voucher of the party who conveys to the tenant—voucher over—judgment ultimately recovered by the demandant, and recompense in value from the last vouchee. If this was a real, adverse proceeding, unquestionably *Andrew's* estate, whatever it was, was gone, and a recompense in value recovered by him from the last vouchee. In an adverse suit, *Andrew* could not falsify the record, as every man is bound by every material admission he makes on record. This estoppel precludes *Andrew* and all claiming under him from gainsaying the fact, that he has lost his estate, and recovered the value of it from the last vouchee. There was no occasion for an actual entry. This is only necessary to avoid a fine, or the statute of limitations.

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But if an actual entry were necessary, *James*, when he conveyed to the defendant by his attorney, was in the actual possession. The benefit of estoppel will enure to the use of the party to whom the right might have been released, or as if the recovery had been a release, and the party in possession may take advantage of it, to conclude the party suffering it, from claiming the land, contrary to his own act. 2 Co. 55. *Coventry on Recoveries*, 195. From whatever cause, by whatever means, *Andrew's* estate was extinguished, the right of entry and the possession were, on its determination, both in *James*, as well as the title in fee simple. Remainders must always take effect in regular order and succession, according to the order in which they are limited, and without any interval, and no remainder can take effect in possession otherwise than on the regular determination of the estate by which it is preceded. *Preston on Estates*, 119, 284.

The person who is the testator's heir at law will have the reversion of the estates, until the fee, when limited in contingency, shall vest in interest, *Fearne*, 373. And where the devisee of the fee is in such case the testator's heir at law, the fee must descend, and such heir at law take by descent. *Carter v. Barnadiston*, 1 P. Wms. 513. For in all such cases, where the devisee is heir at law of the testator, he is heir of the reversion undisposed of, just as if the testator had died intestate. *Slifer v. Beates*, decided the last term in this court. The reversionary interest descended to *Andrew*, the first, not as a purchaser or person described, but in the quality and character of heir, and on his death descended to his heir. For this reversion, though after an estate tail, was still an estate in him. *Preston on Estates*, 316. This consideration will be of importance in a further inquiry. We see the necessity of a double vouchee: of *Andrew* being brought in as vouchee, and the reason why *James* conveyed to *Andrew* one third of the fee. It is the effect of a common recovery with a double voucher, to bar the first vouchee and his heirs, of such estate as was, at any time, in him, and all others of such right in remainder or reversion, as was at any time dependent and expectant on the same. *Pigott, Recov.* 1. A contingent remainder cannot be passed or transferred at law before the contingency happens; otherwise than by way of estoppel or fine, or by common recovery, where the person entitled to the particular estate comes in as a vouchee.

The doctrine of estoppel is thus applied to *Andrew's* life estate. The particular estate which on the regular determination of *James's* freehold estate in possession, was to succeed it, and support the contingent remainders, *Andrew*, by being vouched, was incapable of taking at *James's* death, and the contingency on which it was to arrive, not having happened, the right of entry was in *James*, whose estate entail was changed into a fee. For he was the only person in whom the whole reversionary fee simple vested. It is admitted, nay contended for by the defendants, that *James* acquired

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nothing by the recovery, but what he might legally do. He then legally acquired *Andrew's* life estate, and the recovery was innocent. What follows? It follows, that *James* then held the life estate of *Andrew*. For *Andrew* never could falsify the recovery, nor deny the operation of the deed to lead the uses, to which he was a party, and against whom, in contemplation of law, there was a recovery in a real action, and he recovered over from the common vouchee, full recompense in value for all he lost. But this was a recovery with treble voucher, and the recovery with treble voucher is to make a perpetual bar of the estate whereof the tenant was seised, and of every such estate of inheritance, as at any time, had been in the first or second vouchee, or the ancestor whose heirs they are, as well as of every reversion then depending, as also of all estates, classes, incumbrances, and leases, derived out of any reversion or remainder. *Pigott*, 2. *Andrew* had an estate for life, derived out of the remainder, which thereby became perpetually barred. A common recovery does not only bar the issue's remainders and reversions, but estops all parties, and therefore if tenant in dower, or a jointress join in a common recovery, she is barred. *Pigott*, 123. All are barred by a common recovery that cannot falsify, *Ib.* 124. In the famous case of *Pells and Brown*, the *Magna Charta* of executory devises, *Cro. Jac.* 592, it was held, that a devise to A. and his heirs; and if he die without issue in the life time of C., then to C. and his heirs; if A. enter and suffer a common recovery, without vouching C., C. is not barred, because no recovery in value extended thereto, unless he had been a party by way of voucher, and then it should. For by entering into the warranty, he gave all his possibility, and, therefore, the court agreed, to the case which was cited by *Davenport* at the bar, to be judged, 34 *Eliz.*, where a mortgagee suffers a recovery, it shall not bind the mortgagor. But if he had been party by way of voucher, it had been otherwise. *James* could not bar the intermediate vested life estate of *Andrew*: but as *Andrew* came in by way of voucher by entering into the warranty, he passed all his possibility to him. If *James* only enlarged his own estate into a fee, and gained nothing from *Andrew*, it must be because the recovery as to *Andrew's* life estate was tortious. If tortious, then both the particular estates of *James* and *Andrew* are forfeited. If not tortious, then *James* acquired *Andrew's* life estate, he had then all the vested freeholds united with the fee simple, acquired by the recovery enlarging his estate tail into a fee simple. There was then nothing to support the contingent remainders, this consolidation merging all the particular estates. So that whether the act of *James* was tortious or innocent, the contingent estates are gone. The perpetuity of ownership enabled the testator to make as many limited estates as he pleased, subject only to be defeated by a person who has the estate tail in possession, or by the owner of a remote estate tail, when he prevails on the tenant of the immediate freehold to

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join with him in the recovery. 1 *Preston on Estates*, 118. By the recovery *James* acquired the ultimate fee. Then, as is said by Lord Chief Justice HALE in *Purefery v. Rogers*, 2 *Saund.* 386, his particular estate merged in the reversion, and the contingent remainder is gone, though there be no divesting of any estate. And he puts this very case: A., tenant for life, remainder in tail in contingency, remainder in tail, *in esse*, and the tenant for life, and he in remainder in tail *in esse* levy a fine: this is no discontinuance, or vesting of any estate, and yet the remainder is gone.

But there is another view of the subject, without considering the effect of the recovery, that, in my mind, is equally conclusive.

The counsel for the defendant, with much earnestness and ability, well knowing its importance to have it so considered, contended, that in default of all such issue, was not a limitation to the right heir of the testator, but a contingent remainder to the heir, at the time of failure of issue, as a purchaser. He has failed to convince me of this. For in default of such issue, is, indefinite failure of issue, including all issue *ad infinitum*. The intention of the testator is plain. The estate was to be preserved in the family of his nephews, so long as there were any issue of them remaining, and the limitations over to the right heirs of the testator, was not to take effect, until their indefinite failure of issue. The ultimate fee remained in his heirs until the contingency took place, which vested the inheritance. It has no relation to the doctrine of *possessio fratris*: for there, there must be an actual seisin. In cases of executory devises, as in *Goodright v. Searle*, 2 *Wils.* 29, there can be no merger. Where a fee simple is first devised, and on that another fee, the second can have no existence until the event is to take place, on which the substituted fee is to arise. Not like the case of reversion, because the testator has nothing to vest. It was impossible for it to merge before it had an existence. If it could be extinguished by merger, it must be by its union with a greater estate, out of which it is to be considered as a part, or, at least, an extraction. But how can two estates so unite, or one become blended with, or absorbed in another, when both are of equal measures, viz. both fee simple: and of which the one cannot commence an existence at all, but in the event which destroyed and annihilated the other. *Fearne*, 561. But this is quite different. It is a case of a limited estate and a reversionary fee, consisting in the same person, and in such case, an estate for life, or a fee simple conditional at the common law, and the reversionary interest of the party who granted it, vesting in the same person, creates a merger. A fee simple is the largest estate which a person can have, and may be divided into different parts, consisting of particular estates; and when the limited or conditional estates unite again in the same person, they form again one entire estate. Merger applies uniformly to estate, and takes place independently of any intention of the party, as often as two estates carved out of the same fee, unite in the same person, one of which

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is larger than the other, which receives it, and that one must always be a remainder, and there can be no remainder after a fee simple, and therefore, no merger. But here there were two intermediate estates for life, united in *James*, which unite as both the estates of *James* and *Andrew* did with the fee in *James*. These estates became absorbed in the fee simple. But *James* by the recovery, acquired an absolute fee simple, subject to the intermediate contingent estates, and there could not be an absolute and a qualified fee in the same person. *Tregonwell v. Strachan*, 5 T. R. 107. In the notes delivered, 16, Geo. 3. For the common recovery passes not a bare fee. The reversion does not take place as if tenant in tail had died without issue, but passes a full, absolute, unlimited, and rightful fee, and passes the fee in the same manner as the fee is passed by a feoffment of tenant in fee. Where there are two successive fees, the second is not the old reversion, waiting on the limited fee, and constantly *in esse* whilst that limited fee continues, but is a new fee which never will be *in esse*, until the limited fee ceases: and no act done by the owner of the limited fee, during its continuance, will enable the person who has the chance of the second fee, to interfere with him. But here, all the estates were concurrent, not successive, or shifting, and this distinguishes the cases. Consider this as if no recovery had been suffered. The reversion descended to *Andrew*, the nephew, the sole heir of the testator. He took it by descent, as if undisposed of by the will. He died in the life time of *William*. The fee then descended to all the children of *Andrew*, *James*, the eldest, taking two shares, as our intestate laws then stood. The particular estates and the reversion remained separated, until the death of *William*: they then, for the first time, united in the person of *James*. He was the tenant for life, with contingent remainder to his eldest, and all his sons in succession, and the sons in tail male, remainder to *Andrew* for life, with contingent remainder to the sons of *Andrew*, in like manner, with remainder to *James* in tail general, and remainder in fee to him, by descent from his father. If the whole estate had descended to him in fee, as sole heir, as it would at the common law, there could be no question, by this consolidation of estate, but that the estate for life in *James* was merged by the estate of inheritance upon him, and this is *Kent v. Hartpool*. T. Jones, 76. 1 Vent. 306, and *Hooke v. Hooke*. Hardw. Cas. 13. In the last case lands were conveyed to the use of A. and his wife, remainder to the use of B., son of A. for life, remainder to the first and other sons of A. in tail, remainder to his daughter in tail, remainder to A. in fee. A. and his wife died, in the life time of B., who afterwards died without issue. The question was, whether the wife of B. was entitled to dower in the lands, and it was decided, that she was; because the estate for life of B. was merged by the descent of the inheritance upon him, and the contingent remainders destroyed. Here if *James* had died after the death of *Andrew* and *William*, his wife would have been dowa-

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ble; and Mr. *Fearne*, (*Fearne*, 342, 34.) shews the reason. To be sure, it would be incompatible with reason, that if *James* had taken the life estate and the fee simple both from the testator, that they should immediately merge the particular estate; that it should be destroyed at the same moment, and by the same instrument which created it. In that case, the will would be *ipso facto* void. But where the accession of the inheritance is by a conveyance, accident, or circumstance, distinct from that which created the particular estate, as there, there could be no such suicidal conjunction: for both estates took effect, the particular estate, and the general fee, and having the capacity to take effect, they are not afterwards exempt from the operation of merger by descent. But the difficulty arises from *James* not taking the whole estate from his father, and this is not a consolidation of the entire estate, and, therefore, only a partial merger. I own it is a new question, not now necessarily calling for decision, yet as I am at present impressed, it does appear to me to produce the effect of a general merger. The doctrine is, that an alteration of the quantity, though not of the quality of the particular estate destroys it. It is not the identical thing, the same crutch for the contingent remainder to lean upon. It cannot be lopped, or split into parts, and still bear the weight of the whole contingent estates. For it was necessary, that there must be a reversion of the entire estate, to produce a merger. It would follow, that if tenant for life conveyed by feoffment all but one inch of the particular estate, that inch would support the whole remainders. It is a curious speculation. *Fearne*, 338, states the broad proposition, that any alteration in the quantity of the particular estate will destroy the whole contingent remainder, though an alteration of the quality would not. But the recovery by *James* renders this all mere speculation. For by that he acquired the fee simple in the whole. There was then no continuing life estate *in esse* to support these remainders. They were *in nubibus*, and never could be called into existence, when the event took place which would give them life. No matter how this was produced, whether by forfeiture, estoppel, consolidation, or merger. And it is fully clear to me, that even a conveyance by bargain and sale, if there had been no common recovery, in which *James* and *Andrew* united, as here they did, would vest the fee simple in the purchaser. As if A. be tenant for life, remainder to his sons successively, in tail male, remainder to B. in fee, and if, before the birth of a son, A. convey to B., or A. and B. join in a conveyance to C. by bargain and sale, lease and release, the contingent remainders to the sons are destroyed. So where the estate is limited to A. for life, either in possession or remainder, with remainder to his sons in tail, with remainder and reversion to A. in fee; if before the birth of a son, A. executes a conveyance by lease and release, or bargain and sale inrolled, his estate for life, and remainder and reversion in fee become united, and the remainders to the sons destroyed.

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Fearne, 321. The distinction is, where the descent of the inheritance is immediate from the testator; there it does not merge the particular estate. But where it does not descend immediately from the ancestor who granted the particular estate, but mediately, the contingent remainders are destroyed. *Fearne*, 341. Here *James* took the life estate from the testator, but the general estate, the fee, descended to him from his own ancestor, *Andrew* the first. There are many other questions arising from this will, the recovery, and subsequent acts of *James* and *Andrew*, and other events in the family, which present themselves. But the transaction is so fruitful of curious questions, that it is time to stop, as I am of opinion, for the reasons I have stated, that *Samuel Richards*, the defendant, has a good title in fee, conveyed to him of the premises, out of which this ground rent is to issue; and, therefore, that judgment should be entered for the plaintiff.

Judgment affirmed.

END OF MARCH TERM, 1823.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LANCASTER DISTRICT—MAY TERM, 1823.

[LANCASTER, MAY 19, 1823.]

HENDERSON *against* LEWIS, surviving Executor of GODFREY, to the use of JONES.

IN ERROR.

Where payment is pleaded, and issue joined thereon, the short entry of set off added thereto, is only a notice, and not strictly a plea, and therefore, requires no replication.

One of two joint obligors, not summoned, is not a witness for the other who is summoned, to prove under notice of set off, a debt due from the plaintiff to the witness, though the witness is released by the defendant.

A debt due from the plaintiff to the co-obligor not summoned, is not a set off against the plaintiff's demand on the obligor who is summoned.

The separate debt due by the plaintiff to one co-obligor, cannot be set off against a joint demand against both.

The lapse of less than 20 years may, with other circumstances, afford a presumption of payment of a bond, but without circumstances, it must be at least 20 years to raise the presumption.

ERROR to the Common Pleas of Lancaster county.

Debt on bond, brought to *January* term, 1818, by *William Lewis*, surviving executor of *John Godfrey*, deceased, to the use of *Daniel C. Jones*, against *George Henderson* and *Thomas Henderson*. The sheriff returned served on *Thomas Henderson*, and he alone appeared. The plaintiff filed a statement against *Thomas Henderson* alone, (mentioning a return by the sheriff of not summoned as to *George Henderson*,) claiming the principal and interest due upon a bond executed by the said *George* and *Thomas Henderson*, dated the 4th *September*; 1798, in the penal sum of £300, conditioned for the payment of £150 to the said *John Godfrey* on the 4th *September*, 1799, with interest from the date. This statement admitted that the obligors had paid one year's interest, and also, £6 18s. on the

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8th April, 1802. The defendant, *T. Henderson*, pleaded payment with leave, on which issue was joined. At a subsequent day, the defendant added the plea of set off, by a short entry on the docket, to which the plaintiff never replied. On the trial, after the bond had been read, the defendant offered in evidence the deposition of *George Henderson*, one of the obligors, made the 2d September, 1820, to prove that in the years 1807 and 1808, the plaintiff, *Daniel C. Jones*, received from him in boarding, articles furnished, and cash paid on his account, to the value of upwards of 200 dollars, which he, the said *G. Henderson*, considered at the time, as so much paid on account of the bond. Accompanying this deposition, the defendant produced a release, under seal, from him to the said *G. Henderson*, dated the 2d September, 1820. but admitted to have been executed and delivered before the deposition was taken. By this instrument the defendant released *G. Henderson* from all responsibility to him in case he should be unsuccessful in this suit, and from paying him any thing in any event: and covenanted to pay the whole sum, if any, which might be recovered against him in this suit, without any recourse to the said *G. Henderson*. The plaintiff objected to the deposition, and the court below rejected it. The defendant, thereupon, tendered a bill of exceptions.

The court charged in the following terms:

It is contended on behalf of the defendant, that this bond is to be presumed to be paid from the lapse of time which has taken place from the period it became due, without being demanded. But the law requires that 20 years should elapse from the time the bond became due, before the presumption can arise from the lapse of time alone. This bond was not due until the 4th September, 1799, which constituted a period of 18 years and 3 months. Even if 20 years had elapsed from the time the bond became due, until it was sued, the presumption may be repelled by other circumstances, such as the payment of interest within the 20 years, or payment on any other account within that time. Whether the payments credited in this case were made within that time, it would be necessary for you to decide, if 20 years had elapsed between the period at which the bond became due, and that at which it was sued: but as that is not the case, the plaintiff is entitled to recover the balance due on it, with interest.

The defendant excepted to this charge, and the jury gave a verdict for the plaintiff.

The errors now assigned were, first, that there was no issue on the plea of set off. Second, that the deposition of *G. Henderson* was not admitted. Third, that the court erred in their charge.

Buchanan for the plaintiff in error, contended,

1st. That the plea of set off was not replied to, and no issue was joined upon it. A set off cannot be given in evidence on the plea of payment with leave. 2d. That *G. Henderson* was a competent

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witness. The only objection that could be suggested was, that he was a party on the record: but that is not sufficient, if such party be wholly divested of interest, as the witness here was. In *Hickert v. Haine*, a defendant, one of the administrators of *Hickert*, was offered as a witness, after having released, and an offer made to pay the costs: but the court rejected him on the ground, that a mere offer to pay the costs was not sufficient, and that he was still interested, because the verdict might implicate him. It was not suggested by the court, that if he had been wholly disinterested, he might not have been a witness. *G. Henderson*, however, was free from all interest; because not being then a party to the suit, he could not be affected by the verdict, if in favour of the plaintiff. Nor would he be liable in another suit, because the action was originally joint, and the judgment must be against one, by which the cause of action would become extinguished. *Williams v. McFall*, 2 *Serg. & Rawle*, 280. The reception of plaintiffs as witnesses is now familiar, in cases where they have no interest in the suit. In *Drum v. Simpson's Lessee*, 6 *Binn.* 478, the lessor of the plaintiff was held to be a good witness for the defendant, being only a trustee. So a nominal plaintiff is a witness for the party beneficially interested, on a sum being paid sufficient to cover all the costs. *Browne v. Weir*, 5 *Serg. & Rawle*, 401. In *Purviance v. Dryden*, 3 *Serg. & Rawle*, 402, the point now before the court was in effect decided. There it was held, that if a writ issue against two, and only one be taken, and the suit proceed against him alone, the other is not excluded from being a witness on the ground that he is a party to the suit. The practice of severing the party not summoned, is now become a well established course in this state, and was recognized many years since in *United States v. Parker*, 2 *Dall.* 273.

3d. The charge was erroneous in stating that there could be no presumption of payment, 20 years not having elapsed between the time of payment, and the commencement of the suit. In *Rex v. Stephens*, 1 *Burr.* 434, Lord MANSFIELD observed, that there was no direct and express limitation of time when a bond should be supposed to have been satisfied. The general time, indeed, was commonly taken to be about 20 years: but he had known Lord RAYMOND leave it to a jury upon 18 years. In the *Mayor of Hull v. Horner*, *Cowp.* 109, he even says, that a jury may presume a bond to be discharged, where no interest appears to have been paid for 16 years. In this instance, the period exceeded 18 years, and therefore, the court ought to have left it to the jury to draw the presumption of payment if they thought proper.

Hopkins, contra, made no observations on the first point, as it was in a great measure relinquished.

1st. This point is a novelty: one of the joint obligors is called as a witness to extinguish the obligation. He was released by the defendant, but that could not make him a witness for himself. It is a dangerous principle which is now set up: because joint obligors

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will have only to separate, so as to live in different counties, and then one may be a witness for the other. It is not the fault of the obligee, that one of the obligors could not be taken in the county in which he was sued. Nor is the debt extinguished by judgment: there must be satisfaction, otherwise *G. Henderson* remains liable, wherever he may be found. He cited *Bantleon v. Smith*, 2 Binn. 146. *Chapman v. Martin*, 13 Johns. 200.

2d. There were 18 years and 3 months, between the time of payment of the bond and the institution of this action, besides which, one year's interest had been paid. It is well settled in *Pennsylvania*, that where time alone is the circumstance relied on, not less than 20 years will raise the presumption of payment. The cases cited from 1 Burr. 434, and Cowp. 109, are not to the purpose, for in them there were other circumstances besides the length of time.

Buchanan, in reply.

1st. Was *G. Henderson* interested? Could the plaintiff sustain an action against him after this suit? I contend that he could not. By bringing a joint suit he has precluded himself from so doing: by a judgment against one in a joint suit, on a joint and several bond, the bond is extinguished; there is no instance in this state of a suit against one joint obligor after a judgment in an action brought jointly against the other obligor.

2. The charge of the court was wrong. It was peremptory to find for the plaintiff without leaving it to the jury to judge from circumstances. The court had no right to take the case from the jury.

The opinion of the court was delivered by

GIBSON, J. By the English statutes, where either the debt for which the action is brought, or that proposed to be defalked, has accrued by reason of a specialty, the set off must be pleaded in bar: in all other cases it may be either pleaded or given in evidence on the general issue. By our act of assembly, the defendant may, in all cases, either plead it specially, or give it in evidence on notice under the plea of payment, at his election; and where payment is in fact pleaded, the additional short entry of "set off," is not considered as a plea, but a minute or memorandum that a set off is intended to be relied on. A formal plea would require a replication; but nothing appears here beyond the customary short entry, and the cause having been put at issue on the plea of payment, the record is in this respect well enough.

The deposition of *George Henderson* was properly excluded. The bill of exceptions presents the case of a joint obligor, against whom the writ was issued, but who was not summoned, being produced to prove a debt against the plaintiff separately due to himself; and although he might not be incompetent to testify to any fact in the cause merely on the ground of having originally been joined as

(Henderson v. Lewis, surviving Executor of Godfrey, to the use of Jones.)

a party, he might be incompetent on the ground of a particular interest. From liability to the plaintiff, he was discharged by the action, which was originally joint, being prosecuted separately against his co-obligor; and from liability to the defendant to contribution for the debt and costs that might be recovered, which would otherwise be sufficient to exclude him, (*Riddle v. Moss*, 7 Cra. 206,) he was discharged by the defendant's release: but he was clearly interested in the demand proposed to be defalked.

In permitting cross demands to be set off against each other, the object is to prevent circuity of action; and a successful attempt to set off a debt, must therefore necessarily be equivalent to the recovery of it by a separate action. Here, had the demand of the witness been successfully used as a defence, he would have been entitled to the benefit of it, between himself and his co-obligor, and to permit him to sustain his own demand by his own evidence, would be to allow him to appear as a witness in his own cause. The release by *Thomas Henderson*, the co-obligor and defendant in the cause, of all responsibility on the part of the witness, as well as his covenant to pay whatever might be recovered, without recourse to the witness, did not remove this interest: nothing but the release of the witness himself could do that. But independent of personal objection to the witness; the debt itself was not the subject of defalcation; because not being due to the defendant but to the witness, who was not a party, it wanted the ingredient of mutuality. The object in permitting debts to be set off, being, as I have said, to prevent circuity of actions, it of course can be allowed only where the parties have a mutual right to sue each other. But here there was, as respects the debt attempted to be set off, nothing like privity between the plaintiff and the defendant. Where a bond is sued jointly and one of the obligors is not summoned or taken, they who appear shall be charged with the whole. Here the person to whom the debt was alleged to be due, was not a party to the suit, and was offered as a witness avowedly on that ground. How then could he urge a defalcation of his debt in a cause in which he was not defendant? Or how could his co-obligor who was a defendant, and the defendant exclusively liable, urge it, when the debt was not demanded by him? In this respect the case is perfectly analogous to that of *Cramond v. Bank of the United States*, 1 Binn. 64, in which the set off was not allowed. But if both obligors had appeared, this separate debt of one of them, could not according to the English statutes have been set off against the plaintiff's joint demand; and I am not aware of any thing in our act of assembly to create a difference. The case of a set off by a surviving partner, of a partnership debt against his own separate debt, depends on the circumstance that the right to sue for the partnership debts survives to him; and as he may sue for them as his own, he may set them off as his own.

Then as to the error assigned in the direction of the court. Between the time when the bond became due, and the time when it was put

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in suit, there was an interval of eighteen years and three months; during which there appears to have been endorsed on the instrument a credit of a years interest, and a small part of the principal. The rule with respect to the presumption to be drawn from lapse of time, is derived by analogy from the English statute of limitations concerning writs of entry into land, and the statute of limitations concerning writs of error; and it is adopted both by courts of law and by courts of equity: by the former not only in the case of a stale claim on a bond, but in the case of the peaceable possession of a franchise, or incorporeal right; and by the latter in the case of a bill by a mortgagor to redeem, and in the case of a bill of review. Our act of assembly restrains the commencement of actions for recovering the possession of lands to twenty one years from the time the right of entry first accrued; but the rule, as stiled in analogy to the English statute, the limitation in which is only *twenty* years, was adopted here before our act was passed; and it was not afterwards worth while to alter it merely for the sake of preserving the analogy. But the rule is in the nature of a statute of limitation furnishing, not indeed a legal bar, but a presumption of facts and although less than conclusive, yet *prima facie* evidence of it, and therefore sufficient of itself, to cast the burthen of countervailing evidence on the opposite party. When less than twenty years has intervened, no legal presumption arises; and the case not being within the rule, is determined on all circumstances; among which, the actual lapse of time, as it is of a greater or less extent, will have a greater or less operation. All this is so clearly stated by Lord MANSFIELD, in the *Winchelsea* causes, 4 *Burr.* 1962, as to leave no doubt of the origin and nature of the rule. In the case of a debt accruing by reason of a specialty, it was necessary for the sake of convenience and repose to establish some certain period after which payment should be presumed from lapse of time alone: and that period was, in analogy to the statute of limitation, fixed at twenty years. But it is to be observed, there is an obvious distinction between length of time sufficient, of itself, to raise a legal presumption of the kind which I have mentioned, and length of time which, although insufficient for that purpose may nevertheless, in connection with other circumstances, fairly enter into the estimate of the proof to be derived from the whole evidence. The rule is applicable only to the first, because no *legal* presumption of the fact can be obtained from the second, and *stabitur presumptioni, donec probetur in contrarium* cannot be predicated of it: it is a matter exclusively for the consideration of the jury. A want of attention to this, has I apprehend given rise to the loose *dicta* of Lord MANSFIELD, and other judges of the length of time necessary to found a presumption of payment, being 20 *about* years, and of cases having been left to the jury where it was but eighteen. To deprive the rule of fixed limits would, besides rendering its application in most cases, difficult and uncertain, change its very nature, and destroy all analogy to the statutes of limitations from which it was derived.

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If eighteen years be left to the jury as sufficient in one case, why may not seventeen, or any less number, be left to them as sufficient in another? But the presumption is not subject to the discretion of the jury: they are bound, where it operates at all, to adopt it as satisfactory proof till the contrary be made out; and hence when we hear of less than twenty years being left to the jury, it must be understood to have been in connexion with other circumstances, and not as making out the defendants case in the first instance, but as going for just as much as the jury might under all the circumstances, estimate it to be worth. In the case before us there was not a lapse of time sufficient to authorise a presumption of payment, and as there was nothing in aid of the time which actually elapsed, I am of opinion the cause was properly put to the jury.

Judgment affirmed.

[LANCASTER, May 19, 1823.]

WEIDNER *against* SCHWEIGART.

IN ERROR.

The possession by the defendant of an order on him, signed by the plaintiff, to pay money to a third person, whose receipt is endorsed but not proved, if not objected to as evidence to go to the jury, may be charged by the court to be evidence of payment, though not conclusive.

ERROR to the Court of Common Pleas of *Lancaster* county.

Assumpsit in the court below by *John Weidner*, the plaintiff, against *John Schweigart*. On the trial, the plaintiff proved a settlement between the defendant and himself in *April*, 1813, in which the defendant acknowledged himself indebted to the plaintiff in the sum of 131 pounds, 12 shillings, and 4 pence. The defendant alleged payment since that time, and gave in evidence, two orders in his possession, drawn on him by the plaintiff: The first dated the 9th *March*, 1814, in favour of *John Carkey*, for 100 pounds, with a receipt indorsed, dated the 16th *March*, 1814, and signed by *John Carkey*. The other dated the 6th *April*, 1814, with a receipt indorsed as follows:

Mr. *John Schweigart*, please to send by the bearer the remainder of the money due me:— £ 31 12 4

Interest of the whole, 7 00 0

38 12 4

April 6th, 1814.

Peter Weidner.

Indorsed—Received, *April*, 1814, from *John Schweigart*, the

(Weidner v. Schweigart.)

sum of 38 pounds, 12 shillings, and 4 pence; being in full satisfaction of the within order:

£ 38 12 4.

his
Samuel —||— *Eidel*.
 mark.

The drawing of the said orders was admitted by the plaintiff, and also that *John Carkey* signed the receipt indorsed on the first order, and paid him the 100 pounds. No other evidence was given, and the defendant requested the court to charge the jury, that the possession by the defendant of the order of the 6th *April*, 1814, was *prima facie* evidence of the payment of the same; and, in this case, has become conclusive, no evidence being given to the contrary. The president in the court below charged in the following terms: "The court cannot go so far as to say that it is conclusive, but we think it is evidence to go to the jury, upon which they will judge, whether, connected with the other circumstances of the case, it is sufficient to authorise a presumption of payment. But it appears to me, that the indorsement of a receipt which has not been proved, goes a great way towards removing the presumption which might otherwise arise. If you think there is sufficient evidence of the payment of the money, you will find for the defendant; otherwise, you will find for the plaintiff for the balance with interest."

The defendant excepted to this charge: as did also the plaintiff, "so far as related to the point, upon which the defendant requested the charge of the court." The jury found a verdict for the defendant.

Hopkins, for the plaintiff in error, now contended, that the court erred in saying that the order of the 6th *April*, 1814, was evidence to go to the jury, because, *per se*, it was no evidence whatever of payment. It was not a negotiable order, nor did it vest any property in the bearer. The best evidence which the nature of the case admitted, was the oath of *Eidel*, who it is alleged, received the money: or, at least, there should have been proof of his handwriting. Without these, the order was mere waste paper, and improper for the consideration of the jury: yet, from the manner in which the court charged, the indorsement went to the jury as evidence, without any proof. The court also erred in leaving it to the jury to say, what was the legal effect of this paper's being found in the defendant's possession, and whether it was proof of payment.

Buchanan, contra The paper was given in evidence without objection: the defendant admitted that he drew the order: and it is too late now to contend that it was no evidence at all of payment. The bearer was the agent of the plaintiff, and the order's being drawn by the defendant, and being in the defendant's possession, were certainly some evidence of payment. No prudent man would give up such an order without payment. It is not pretended that the order was negotiable to all intents and purposes, but it was so

(Weidner v. Schweigart.)

to a certain degree. The defendant would have been justified in paying to any bearer, without further inquiry. Banks never take a receipt for payment of a check payable to bearer. It is sufficient for us, that possession was *prima facie* evidence of payment. In *Cruger v. Armstrong*, 3 Johns. Cas. 5, it was held, that the holder of a check is *prima facie* to be deemed the rightful owner of it, and he need not prove a consideration, except where circumstances of suspicion appear. Possession of an order to pay money is *prima facie* evidence of payment, though it is otherwise of an order to deliver goods. *Taylor's N. Car. Rep.* 40. Being, then, *prima facie* evidence, it was incumbent on the defendant to call *Eidel* to rebut it. At all events, the objection should have been taken before the paper was read in evidence.

Hopkins, in reply. A bank check is quite different from the present order. That vests a property in the check. This order is, to send the money by the bearer and vests no property. We did not object to the reading of the order in evidence, because it was the writing of the plaintiff, and we expected it would be followed up by an attempt to prove the receipt, which we were prepared to contradict. The defendant cannot now separate the order from the receipt: they all form one transaction, and one item of evidence. The court took the receipt into view in their charge, and thus the jury considered the receipt as evidence. In the conclusion of their charge, the court left it to the jury whether there was sufficient evidence of payment. This was matter of law.

The opinion of the court was delivered by

TILGHMAN, C. J.—On the trial of this cause, the plaintiff proved that the defendant was indebted to him; and the defendant, in order to satisfy the jury that he had paid the debt, gave in evidence a note or order by the plaintiff, directed to him, in the words following: Mr. *John Schweigart*, please to send by the bearer, the remainder of the money due me,

£31 12s. 4d.

Interest of the whole,

7 00 0

 38 12 4

(signed) *Peter Weidner*.

April 6th, 1814.

Indorsed on this note, was a receipt, signed by *Samuel Eidel*, for £38 12s. 4d. in full satisfaction of the within order; but no evidence was given of the signature of *Eidel*, or of the payment of the money to him, nor was the indorsement read in evidence to the jury. The counsel for the defendant prayed the court to charge the jury, that the possession of this note was *prima facie* evidence of payment; and not having been contradicted, this evidence becomes conclusive. The court charged, that the possession of the

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note was evidence of payment, but not conclusive; and that the presumption of payment arising from the possession, was in a great degree destroyed by the indorsement of a receipt which had not been proved. The jury found for the defendant, and the plaintiff now alleges for error, that they were improperly instructed by the court, that the note produced by the defendant was some evidence of payment. It is too late now, to say that the note was no evidence of payment. If it was no evidence, the defendant ought to have objected to its being given in evidence. And, considering that it had been given in evidence without objection, the charge of the court was very favourable to the defendant. Indeed the judge remarked on the indorsement, as a circumstance operating strongly against the defendant; although it had not been given in evidence. The defendant's counsel thought his cause injured by this remark, and excepted to the charge on that account. But the verdict being contrary to expectation, the defendant is now satisfied, and the plaintiff complains. If the plaintiff's counsel had objected to the note's being given in evidence, until proof was made of the indorsed receipt, perhaps he would have been right. But having suffered it to be read to the jury, the least that the court could say, was, that it was some evidence of payment. I am of opinion, therefore, that the judgment should be affirmed.

Judgment affirmed.

[LANCASTER, May 19, 1823.]

M'CAUSLAND'S Administrators *against* BELL.

IN ERROR.

On affirmance of a judgment in this court after a writ of error, interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear interest.

But the plaintiff cannot in such case, charge interest on the costs of suit, until he pays them; though, on payment, he may charge interest from that time.

THIS was a writ of error to the Court of Common Pleas of Lancaster county, and the case was submitted to the court without argument.

The opinion of the court was delivered by

TILGHMAN, C. J. The plaintiff obtained judgment against the defendant in the Court of Common Pleas, which was affirmed in this court on a writ of error. It is made a question whether the plaintiff in error has a right to charge interest on the amount of the judgment in the Common Pleas, from its date until its affirmance in this court, and after the affirmance to charge interest on the sum which was the amount both of the judgment in the Common Pleas

(McCausland's Administrators v. Bell.)

and the interest on it till its affirmance; in other words, whether the aggregate composed of the amount of the judgment in the Common Pleas and interest on it, till its affirmance in this court, was to be considered as a principal, bearing interest from the date of the affirmance. Interest is, in general, a legal incident of every judgment in this state. The law was so declared in *Fitzgerald v. Caldwell's Executors*, 4 Dall. 252; and in *Fries v. Watson*, 5 Sergt. & Rawle, 220, it was decided, that where a judgment has been several times revived by *scire facias*, the plaintiff has a right to charge interest on the aggregate amount of principal, and interest due at the time of rendering judgment on each *scire facias*; upon the same principle, he has a right to charge interest on the aggregate amount of a judgment in Common Pleas, and the interest on it to the time of its affirmance on a writ of error. If it be said, that on a writ of error the judgment which was given below is affirmed in this court, with costs and nothing more, the same remark is applicable to the case of a *scire facias*, where the judgment is no more than an award of execution on the original judgment. But as our act of assembly gives interest on every judgment, we have held, that whenever a judgment is given, it is understood that interest on any former judgment in the same action, is to be charged; and this is doing no more than justice to the plaintiff in error. He is sufficiently injured by the expense, vexation, and delay, of the writ of error. Indeed, it is to be regretted, that this court has it not in its power, to award him a more adequate satisfaction. It is not denied, that the judgment in the Common Pleas bears interest from its date. But the complaint is, of the interest charged on the aggregate amount from the time of the affirmance. If the defendant in error would do justice, by paying what is due, immediately after the affirmance, he would avoid any charge of interest on the aggregate. But if he will not do justice, he has no cause of complaint if he is charged with interest on the whole sum which he ought to have paid. It has also been made a question whether interest is chargeable on the costs of suit. The custom of *Pennsylvania* is singular with regard to costs. With the exception of some particular writs, it has not been the practice to pay the prothonotary's costs, till the action is ended. And when it is ended, if the judgment be for the plaintiff, it has been usual to look for the costs in the first instance to the defendant against whom the judgment was rendered; but if not to be had of him, resort is had to the plaintiff. The law on this subject will be found in the case of *Lyon v. M'Manus*, 4 Bin. 172. I think, therefore, that the plaintiff should not charge interest on the costs, unless he has paid them, and then only from the time of payment. As this case was submitted to the court without argument, I know not whether it is the desire of the parties that a formal judgment should be given. If it be, it will be entered according to the principle I have mentioned.

[LANCASTER, MAY 19, 1823.]

WHEELER and another against HAMBRIGHT.

IN ERROR.

The sheriff is liable for an escape, where he has returned *non est inventus* to a *capias ad satisfaciendum*, which had been delivered to him, if, prior to the return day, his deputy had the defendant in custody under another *capias ad satisfaciendum*, and discharged him; though it do not appear that the sheriff knew of the latter writ, or that the deputy knew of the former.

The declarations of the deputy sheriff respecting the execution of a writ, made after the return day, but while the writ is in his hands, are evidence against the sheriff.

ERROR to the Court of Common Pleas of Lancaster county.

John S. Wheeler and *Courtland B. Howell*, merchants, trading under the firm of *Wheeler & Howell*, plaintiffs below, brought this action of debt against *George Hambright*, Esq. late sheriff of Lancaster county, for suffering a certain *James Wright*, Jr. to escape from his custody after being arrested in execution. The facts of the case, as they appeared on the trial, were, that the plaintiffs having obtained judgment against *James Wright*, Jr., issued a *capias ad satisfaciendum* against him on the 8th February, 1817, returnable to April term, 1817, which was immediately afterwards put into the hands of the defendant, then sheriff, and was subsequently returned *non est inventus*. A judgment having also been obtained against the same *James Wright*, Jr. by *William Hassan*, a *capias ad satisfaciendum* was issued thereon, on the 4th March, 1817, returnable to April term, 1817. *Wright* was arrested on this last writ, by *Mathias Musser*, who had been regularly appointed by the defendant one of his under sheriffs, with power to execute all such writs, as he, or any other for him, might put into his hands, and to perform all lawful acts and things appertaining to the said office of under sheriff. After this arrest, an arrangement took place between the friends of *Wright* and *Hassan*, and *Wright* was suffered to go at large, having been in custody for a period of from a half to three quarters of an hour.

On the trial, the plaintiff offered in evidence the deposition of *Henry Shippen*, who had been the plaintiff's attorney in the suit against *Wright*, and had delivered the *capias ad satisfaciendum* to the defendant, stating, among other things, "that some time after the April court of 1817. *Mathias Musser*, the deputy sheriff, called on him, and asked him to issue an *alias capias* in the same suit, which he refused to do; and in a conversation between him and *Musser*, respecting the executing of said writ, that *Musser* told him, that he had arrested the said *James Wright*, Jr. on a *capias* at the suit of one *Hassan*, and that after obtaining security for the debt to the satisfaction of said *Hassan*, he had permitted *Wright* to go at large, and, at the same time, alleged as his ex-

(Wheeler and another v. Hambright.)

cuse for so doing, that he had not at that time with him, the writ of *Wheeler & Howell*. The deponent could not recollect at what time, precisely, the said conversation with *Musser* took place: but he firmly believed it was after the return day of the writ, and previous to the writ being actually returned by the sheriff." The defendant objected to this part of the deposition, and the court struck it out. The plaintiffs tendered a bill of exceptions.

The court below charged the jury, that to render the sheriff liable, it was absolutely necessary that the second writ should be delivered to him, or lodged in his office, or that he should be acquainted with the fact that it was delivered to his officer, or that *Wright* was in custody before he was set at large: otherwise, unless the officer had the first writ with him at the time, the sheriff was not responsible.

The plaintiff excepted to the charge of the court, and the jury found a verdict for the defendant.

Fuller for the plaintiffs in error, now contended, that the court below had erred in their charge to the jury, and in rejecting the above-mentioned part of Mr. *Shippen's* deposition.

1st. The principle was held in *Frost's Case*, 5 Co. 89, that if A. is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of J. S., upon the delivery of the writ, A. by construction of law, is immediately in the sheriff's custody, without an actual arrest: and if he escape, the plaintiff may declare that he was arrested by virtue of the second writ, which is the operation it has by law, and not according to the fact. 2 Bac. Ab. 511, *Escape in civil cases*. So, it is said by *HOLT*, C. J. in *Jackson v. Humphreys*, Salk, 273, that if the sheriff of *Northumberland* have a man in custody in *Northumberland*, and the sheriff is in *London*, and a writ is delivered to him against that person, he is in custody immediately, upon that writ. This authority is recognized in *Bull. N. P.* 66.

No distinction can be drawn between the sheriff and his deputy: they are in law considered as one person. An arrest by the sheriff's officer is, in judgment of law, the same as if the arrest were by the sheriff in person, and if such officer suffer the party to escape, the action must be brought against the sheriff. 2 Bac. Ab. 519. 5 Co. 89. 6 Bac. Ab. 157. In *Sanderson v. Baker & Martin*, 2 Bl. Rep. 833, it was determined, that trespass will lie against the high sheriff for the bailiff's taking the goods of A. instead of B., under *fi. fa.*: and it is said by *BLACKSTONE*, J., that the sheriff, and all his substitutes, make but one officer, and it was so held in 2 Keb. 325, *Cromer v. Humberton*, and in 19 Hen. 6, 80. *McIntyre v. Trumbull*, 7 Johns. 35, decided that an action lies against the sheriff for the act of his deputy in taking more fees, on levying an execution than are allowed by law; and whether the sheriff recognized the act of his deputy or not, need not be shown. In *Hazard v. Israel*, 1 Binn. 240, this court was clearly of opi-

(Wheeler and another v. Hambright.)

nion, that for all civil purposes, the sheriff is answerable for the act of his deputy, though not criminally.

2d. As to the deposition of Mr. *Shippen*. In *Hecker v. Jarret*, 3 Binn. 404, the court intimated a doubt, how far the acknowledgment of the deputy, of things done by him in the course of his office, is evidence against the principal, or whether those facts must be proved by the oaths of witnesses; and say, that some difference of opinion appeared to have existed on the point. The doctrine now, however, is, that what a sheriff's officer has said at the time of the execution of a writ, or concerning the custody of a debtor taken in execution, will be admissible in an action against the sheriff for an escape, as part of the transaction in which he represents the defendant, and for which the defendant is responsible. 1 *Phill. Ev.* 76. In *Mott and others v. Kip*, 10 Johns. 478, acknowledgments by a deputy while the execution was in force, made to the plaintiff's attorney, were held evidence, in an action against the sheriff for a false return to a *fi. fa.* In *Yabsley v. Doble*, 1 *Ld. Raym.* 190, the question was, if the confession of an under sheriff of an escape be evidence against the high sheriff, and adjudged that it was: because in effect it charges himself. The cases on this head are summed up in 2 *Phill. Ev.* 217, and the general principle laid down, that the under sheriff is the general agent of the sheriff, and that his admissions are to be considered as the admissions of the sheriff. In *Tyler v. Ulmer*, 12 *Mass. Rep.* 163, in an action against the sheriff for the default of one of his deputies, in not paying over the amount of an execution, the letters of the deputy were held admissible evidence. In the present case, the interval was very short between the arrest of *Wright*, and the admissions of the deputy sheriff.

Jenkins, contra.

1st. The *English* law, in reference to the high sheriff and his deputy, is of a peculiar kind, and does not prevail here. In *England*, the high sheriff never serves process. He has a general deputy, who is his general agent, who transacts all the business, and issues warrants to bailiffs to serve process. This deputy is apprised of all writs to be executed by the sheriff. But here, neither the sheriff nor any of his deputies know of all process. The plaintiffs put their writs either into the hands of the high sheriff, or any of his deputies, at their pleasure. In this case, the sheriff, who had the plaintiff's writ, did not know of *Hassan's ca. sa.* against *Wright*, nor did the deputy, who arrested *Wright* on *Hassan's* writ, know of the plaintiff's writ. The fault was the plaintiffs' in not carrying their writ to the sheriff instead of one of his deputies. In *Frost's Case*, 5 *Co.* 89, the defendant was in the custody of the sergeant of the sheriff of *London*, under a *capias ad respondendum*, when *Frost* delivered his *capias utlagatum*, to the same sergeant. In *Atkinson v. Jamison*, cited 8 Johns. 381., A. was arrested by the sheriff, and a detainer in another suit lodged in the office; be-

(Wheeler and another v. Hambricht.)

fore the detainer was known, the officer who had made the arrest discharged A., and next morning he was arrested on the detainer; it was held, that this was an original arrest, and not a retaking after an escape. In *Jackson v. Humphreys*, the case put by HOLT, C. J. is, of a person in custody of the sheriff of *Northumberland*, and a new writ delivered to the same sheriff: not of different writs in the hands of the sheriff, and his officer, without their mutual knowledge of the facts.

2d. The deposition of Mr. *Shippen*, in the part struck out, was not legal evidence against the defendant. The doubt suggested by this court in *Hecker v. Jarret*, has not been removed by any later decisions. In the first place, the declarations of the deputy sheriff related, not to the writ in his hands, but to the writ of the plaintiffs, which never was in his hands, and as to which he never was deputy or agent. But even if they concerned a writ that had been in his hands, yet being subsequent to the transaction of the business, they were not evidence to affect the defendant. The cases show that such declarations are not evidence, unless they form part of the *res gesta*. *Phillips* in his *Treatise*, 1 *Phill. Ev.* 76, confines it to what the officer has said at the time of the execution of a writ, or concerning his custody of a debtor, neither of which is the case now before the court: and he says, that later authorities have restricted such evidence to cases where it constitutes a part of the act for which the sheriff is responsible. In 2 *Phill.* 217, 218, the deputy sheriff is treated as the sheriff's general agent, which he is not in *Pennsylvania*. In the case in *New-York*, reported 10 *Johns.* 478, the declarations of the officer were made in the course of his execution of the writ. Mr. *Shippen's* deposition, in the part struck out by the court below, narrates allegations made by the deputy after the return day of the writ, and some time after all the circumstances had happened, on which the present suit depends.

Buchanan, in reply, contended

1st. That *Musser* was a general deputy, and as such stood in the light of a general agent. He procured satisfaction or security on *Hassan's* writ, and *Wright* was discharged. As deputy, it was his duty to go to the sheriff's office, with *Hassan's* writ before he served it. The arrangement of the sheriff's business, and of his officer's, is his own concern: whatever that may be, he is the responsible officer. It would be out of the power of the plaintiffs to prove their knowledge of *Hassan's* writ: it is sufficient in law, that it was in the hands of the deputy, and the law presumes the sheriff's knowledge of it. He relied on the cases cited on the part of the plaintiff as completely establishing the responsibility of the sheriff.

2d. The declarations of the deputy were offered for the purpose of proving that *Wright* was in his custody at a certain time. These declarations were made before the writ was returned: and, there-

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fore, fell within the rule, that they were in the transaction of the business as deputy, and formed part of the *res gesta*. But whether that be so or not, the deputy sheriff is the sheriff's general agent, and his admissions, or recognitions, are the admissions and recognitions of the sheriff, who has taken security from him, and may look to him for indemnity, in case of recovery against himself.

The opinion of the court was delivered by

GIBSON, J. The argument is, that the existence of the plaintiffs' execution in the hands of the high sheriff being unknown to the under sheriff when he arrested *Wright* on *Hassan's* execution, and the arrest being at the same time unknown to the high sheriff, neither of them, separately, did the plaintiffs a wrong: so that although they have received injury somewhere, they are to have redress nowhere. There is, however, no rule more clearly laid down, or more firmly established, than that a plaintiff who has delivered process to the sheriff to be executed, has nothing to do with the official misconduct or mismanagement of the under sheriff; and that where, by the arrest of an under sheriff or bailiff, the prisoner is in legal estimation in the custody of the high sheriff, the latter is exclusively liable. There are, it is true, cases in the books of actions for escapes against bailiffs, wardens, and goalers; but it will be found, either that such absolute goalers are intended as writs are directed to, or that the bailiffs or wardens were officers of a franchise, and had the execution of all process within its limits; or were in some way or other exclusively entitled to the custody of the party who escaped. But wherever the person who makes the arrest, is the deputy or servant of the sheriff, the custody and acts of the deputy, are the custody and acts of his principal. It is an undoubted principle, that where there are two or more persons who all constitute but one officer, as in *London*, and some other places in *England*, where there are two sheriffs, an arrest by the one, will, in case of an escape, render the other liable, although he neither participated in, or had knowledge of the arrest; as seems to be agreed by HOLT, C. J., in *Taylor v. Clarke*, 10 *Vin. Escape*, B. pl. 18. 3 *Lev.* 399. The only exception to this principle is to be found in *Marsh v. Astray*, *Cro. Eliz.* 175, where it was held, that if a writ be delivered to the under sheriff to summon a party and he neglect to return it, an action will lie against him; for perhaps the sheriff had not notice of it. But this case seems not to be law. *Compleat, Sheriff*, 355-6: for it is agreed that the sheriff is the person in court to answer all actions for the torts and misdemeanours of the under sheriffs and their bailiffs. *Laycock's Case*, *Latch*, 187. For a voluntary escape, however, an action will lie against a goaler, not as an officer, but as a wrongdoer, such an escape being in the nature of a rescue, *Lane v. Cotton*, 1 *Salk.* 18, pl. 8. 10 *Vin. Escape*, B. pl. 19-20: but even there the sheriff also is liable as the officer; and where that is the case, I cannot

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see how he can avail himself of the misconduct of his deputy. In the case at bar, the arrest by the under sheriff was the arrest of the high sheriff, in whose custody, to every legal intent, the prisoner as much was, as if he had been arrested by the high sheriff in person, *Frost's Case*, 5 Co. 89; and it is clear, that a prisoner in actual custody on one writ, is by operation of law, in custody on every other writ lodged against him in the sheriff's office; and if he escape, the plaintiff may declare that he was arrested by virtue of such other writ. *Frost's Case*, 5 Co. 89. *Rolls. Abr.* 94. *Jackson v. Humphreys*, Salk, 273, pl. 6. Why then should the plaintiff be prejudiced by the nature of the relation between the sheriff and his deputy; or by the circumstance that the deputy had not both writs with him; or that he executed the one on which the arrest was actually made, without its having first been delivered to the high sheriff, and without his knowledge, when the deputy by the letter of deputation, was authorized to execute process delivered to him by third person? The sheriff and his deputy constitute one officer. *Compleat, Sheriff*, 43. It is true, however, that from its great antiquity and convenience, the office of under sheriff is recognized by the law, so far as to enable the person who fills it to execute the ordinary duties of the high sheriff: yet he has no estate or interest in the office, nor can he do any thing in his own name, but only in the name of the high sheriff, who is answerable for all his acts. *Hob.* 13. *Salk.* 96. *Dall.* 3. The under sheriff is in fact, nothing else than a general bailiff over the whole county, and differs from a special bailiff only in this, that by the 1st and 2d P. & M. c. 12, the sheriff is bound to appoint a certain number of bailiffs to make replevins and perform certain other duties in his name, but this provision of the statute is not in force here: whereas, he may either appoint an under sheriff, or execute the office in person. But the sheriff is the responsible head, and if he consults his convenience, with respect to the course which his business is permitted to take, it is at his peril. If *Hassan's* execution had been lodged in the office, or had been delivered to the under sheriff by the sheriff himself, instead of being delivered by *Hassan*, it is not pretended that the sheriff would not have been liable. But actual ignorance of the one part of the transaction by the sheriff, and of the other by his deputy, furnishes no excuse. It was the duty of the deputy before proceeding to the arrest, to ascertain whether other writs were lodged against the party, and for negligence, in this his principal is answerable; and it was also the duty of the principal to compel him to do so, or else to restrain him from executing any other process than what he himself should deliver to him, at least he was bound to take notice of every thing which any of his authorized agents did: so that the deputy and the principal were reciprocally guilty of negligence. An officer who is not bound to appoint a deputy and yet does so, cannot be permitted to say, that a fault in the execution of the office was owing

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in part, to want of knowledge in himself, and in part to want of knowledge in his deputy: else it would be easy for the officer and the deputy to shuffle the imputation of negligence from one to the other, till, as in this instance, it would, in the end, rest nowhere. The only way in which the defendant could, in this instance, controvert his liability with any thing like a chance of success, would be by insisting that the arrest was entirely void, by reason of the writ not having been lodged in his office. But the terms of his own deputation are against that conclusion, the deputy being authorized to execute all writs which the high sheriff, *or any person for him*, should put into his hands. This must have been designed to sanction the universal practice of putting process directly into the hands of the under sheriff; but even the existence of such a practice with the knowledge and the assent of the sheriff would amount to an authority. It will scarcely be pretended that *Wright* could have maintained trespass against the under sheriff, because the writ had not been in the sheriff's office. Even taking the defendant, therefore, to be an innocent person, a loss suffered in consequence of his acts, ought to be borne by him, rather than by the plaintiff, a person equally innocent, whose acts did not contribute to it. But the case would be very different if it should appear that the plaintiff had put his execution into the office, knowing that the first process had been delivered to the under sheriff, and with a view to fix the sheriff: that would be such a fraud as would preclude him in any event.

This may seem sharp doctrine towards sheriffs; but it is not more sharp than the law is in the case of an escape by reason of deficiency of the goal; or in the case of a rescue by rebels or insurgents, however overwhelming the force; although the sheriff would be excused for a rescue by foreign enemies, or for an escape in consequence of sudden fire; and in this respect the custody of prisoners resembles that of goods bailed to a carrier, who is answerable for the loss of them, except where it happens by the act of God, or the common enemy. The strictness of the law in this respect, arises from public policy. The sheriff takes his office for better for worse; losses in particular instances, being compensated by extraordinary gains in others. At all events, it is better he should bear the risque of casual loss, than that the public should be left unprotected.

At the trial, the plaintiffs offered evidence of certain declarations or admissions of the under sheriff, to their attorney, made after the return day of the writ, but before it was actually returned; which the court rejected, and sealed a bill of exceptions. These admissions were made by the under sheriff in the course of the business of the office, and while the writ was in the sheriff's hands, and were, therefore, clearly competent evidence; although not for the reason assigned in *Yabsley v. Doble*, 1 *Lord Raym.* 190, that as the under sheriff had given security for the due performance of the of

(Wheeler and another v. Hambright.)

office, his declarations went to charge himself, he being answerable over, and the real party in interest. The declarations of an under sheriff, are evidence to charge the high sheriff only where his acts might be given in evidence to charge him; and then, rather as *acts* than as declarations; his declarations being considered as part of the *res gesta*. It is for this reason that his declarations to a stranger are not evidence against a sheriff.

Judgment reversed, and a *venire de novo* awarded.

[LANCASTER, May, 19, 1823.]

AUWERTER *against* MATHIOT, Sheriff.

IN ERROR.

The judgment creditors of a vendee of land who has paid part of the purchase money and has possession of the land, but has received no deed, are entitled to the proceeds of sale of his title under an execution, in preference to the vendor. A sheriff's sale may be set aside, where the purchaser may be injured in consequence of a misapprehension of the terms of sale, occasioned by the act of the sheriff.

ERROR to the District Court for the city and county of Lancaster, in a suit brought by *Leonard Auwerter*, against *John Mathiot*, sheriff of that county, to recover certain monies in his hands arising out of a sheriff's sale made by him of the property of *William Lytle*. On the trial of the cause in the court below, a verdict was given for the plaintiff, subject to the opinion of the court on a case stated in the nature of a special verdict.

The following opinion of the president of the court below which contains the principal facts, was filed of record and was now brought up by writ of error.

Judgments were obtained in the Court of Common Pleas of this county, against *William Lytle*,

By <i>J. Griffith</i> , for the sum of	-	-	-	-	\$ 550 48
do. do. do.	-	-	-	-	1100 00
By <i>M. Mussleman</i> , for the sum of	-	-	-	-	309 89
And by <i>L. Auwerter</i> , for	-	-	-	-	1906 96

Amounting in the whole to the sum of	-	-	-	\$ 3867 33
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At the time of these judgments, *W. Lytle* was in possession of a tract of land, which he purchased of one *John Barkman*. The contract of purchase was by *parol*, for the sum of 12,348 dollars. About 6000 dollars of the purchase money was paid to *Barkman*, and possession of the premises was delivered to *Lytle*, who continued therein, but no deed was then executed, and the balance of

(Auwerter v. Mathiot, Sheriff.)

the purchase money is unpaid, and *Barkman* retains the legal title. So that *Lytle* had an equitable title only, but would have a right to call for the legal title upon payment of the remainder of the purchase money.

To November Term, 1816, *Lytle* brought his action against *Barkman* upon his contract, which went to an arbitration; and on the 17th of January, 1817, the arbitrators filed their report, awarding that there was due to the defendant from the plaintiff, for the purchase money, the sum of 6520 dollars 47 cents to be paid on the defendant's making a clear and indisputable title to the plaintiff, free of incumbrances, for the premises sold to *Lytle*, by the said *parol* bargain and sale. On the 25th of April, 1817, after this award, *Barkman* executed and tendered to *Lytle*, a deed for the premises with a general warranty; and demanded the balance of the purchase money, but it was not paid. There was an existing mortgage on the premises from *Barkman* to the executors of *William Bullen*, dated on the 13th of April, 1805, for the payment of £1000, which was assigned on the 13th of August, 1812, to *George Ellmaker*, who on the 13th of April, 1817, assigned it to *George and William Eckert*. *George Eckert*, who was present at the tender of the deed, offered to release the mortgage on his receiving the amount due thereon, though the exact sum did not appear, out of the purchase money due to *Barkman*.

In November Term, 1816, a suit was entered in the name of *William Powers, jun.* for the use of *William Eckert*, against *Wm. Lytle* and *Reuben Marsh*, which was referred before the return of the writ, and an award was filed and judgment thereon for the sum of \$581 90. On the 11th October, 1816, upon the execution issued in this last mentioned suit, the sheriff, the defendant in this suit, on the 31st July, 1819, sold the land in possession of *Lytle*, and all his estate and interest therein for the sum of 5902 dollars, and the purchaser on that day signed the conditions of sale, which are referred to and made part of this case, for the greater certainty as to the terms thereof.^(a)

The sheriff executed his deed to the purchaser for the premises sold, which was acknowledged in the Court of Common Pleas, on the 26th of April, 1820, and delivered to the purchaser, who paid the purchase money, which is admitted to be in the hands of the sheriff, the now defendant.^(b) There are different claims to the proceeds of this sale, the judgment creditors contend that they

(a) The following was one of the conditions of sale.

"The property now sold as the real estate of *William Lytle*, consists of his right, title, and interest of, in, and to, a certain tract of land situate in *Salisbury* township, containing 102 acres, more or less, whereon is erected a stone messuage, and stone barn, &c."

(b) On motion, the Court of Common Pleas, on the 21st and 26th, April, 1820, ordered the sheriff to bring the money into court: and granted a rule to show cause why the money arising from the sale of *Lytle's* property, should not be paid to *J. Barkman's* creditors, and himself.

(Auwerter v. Mathiot, Sheriff.)

must be appropriated to their judgments, as far as they go; *John Barkman* claims it by virtue of his lien, and contends that the general judgment creditors can take nothing till he is satisfied for the balance of his purchase money, which is a specific lien on the land; that he is entitled to the preference, and that his estate cannot be taken to pay the debts of *William Lytle*. This question is, therefore, distinctly raised by the case stated, and if *Barkman* is entitled to the priority, his claim takes the whole money, and the judgment creditor get nothing, and the plaintiffs in this suit must fail. But if *Barkman* be not entitled to have his claims satisfied out of the proceeds of sale then the claim of the plaintiff is covered by the amount of sales in the sheriff's hands, and the verdict must stand.

The case has been argued on both sides, with great ability, and I have given to it all the consideration in my power; and have struggled, if possible, to find a doubt or difficulty. But I have not been able, with all the assistance of the arguments, to start a point to create any hesitation as to the law of the case, and my opinion is clear and decided.

That *John Barkman* has a lien on the premises for his unpaid purchase money is without doubt; and that lien will follow the land into whose possession soever it may come; and a purchaser from *Lytle*, either directly or by operation of law, will hold subject to the same lien. *Barkman* has retained the legal title; and it is a principle, that where a subsequent purchaser acquires a mere equitable interest, he is not entitled to notice of the lien of the original vendor; he must look to the interest he acquires; and if he finds no legal conveyance of the land, he cannot set up the want of notice of the lien on the land for the original purchase money. As this case is, therefore, it is clear of all the litigated questions on the subject of lien, which have agitated the courts of late years, but depends on first principles. It is not necessary to say more upon it, or to enter into a consideration of the cases on this very important subject. But *Lytle* has also a lien, so far as he has paid money on his contract, in case a proper title be not made to him. And in this respect, the right is reciprocal, and I incline to think, though it is not necessary to decide, that in this case a judgment against *Barkman*, after the contract and possession delivered to *Lytle*, would affect the land no further than to the extent of the purchase money unpaid; *Barkman* being a trustee for him, holding the legal title as a security for what may not be paid. *Lytle*, has, therefore, an equitable interest in the land, he paid a large sum of money on account, and had the possession. This is such an interest as by the law of *Pennsylvania* can be taken in execution and sold. It is entirely distinct from the claim or lien of *Barkman*, which cannot be prejudiced. His lien affects the whole land and surmounts the mere equitable interest which his general creditors have a right to, placing themselves in the situation

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of the vendee, with the right to call for the title, on payment of the balance of the purchase money.

The purchaser at sheriff's sale purchased only the title of the debtor, whatever it may be. If he has but an equity, the purchaser acquires no more; he cannot raise himself higher than the debtor, and he must abide by the situation in which the debtor himself stood. If his title was defective the title of the purchaser can be no stronger. The sheriff sells the interest of the debtor in the execution, whatever that may be. He does not stipulate for the soundness of the title. The purchaser must take that at his risque, and so it has been universally understood. He therefore does not sell out and out, as has been contended. He sells by authority of law, and cannot go beyond his power or undertake to give a better title than the defendant in the execution himself had. He could not therefore sell or affect *Barkman's* interest. *Barkman* was neither party nor privy; his interest was paramount, and could not be prejudiced. He shall not, therefore, interfere with the creditors claiming merely a lien upon the equitable interest of *Lytle*, distinct from the legal title to the land which *Barkman* retained as a security for his contract.

There is no analogy between this claim and the lien of a judgment. It is a real interest in the land, a charge upon which descends, and is assigned with it. The equitable owner has a distinct interest, which may be followed by his creditors, who may take it in execution, and sell it; but they can only sell it subject to this charge. The interest of the original vendor cannot be affected. He sustains no injury by such sale, nor shall he take any benefit from the proceeds. The verdict is to stand and judgment is to be entered for the plaintiff.

It was now assigned for error in this opinion, that the court below erred,

1st. In not extending to the purchaser the legal and equitable protection of having the purchase money applied to discharge the liens and incumbrances against the estate purchased.

2d. In not declaring the mortgage to *William Butler* transferred to *Ellmaker* and by him to the Messrs. *Eckerts*, entitled to be paid out of the purchase money, in preference to any of *William Lytle's* judgment creditors.

3d. In not declaring the judgment creditors of *John Barkman*, which bound his interest in this land, in the hands of *Lytle*, entitled to a preference over the judgment creditors of *William Lytle*.

4th. In not declaring that *John Barkman's* judgment for the balance of the original purchase money, due to him from *Lytle* for the lands since sold by the sheriff, which was secured by the legal or equitable title being retained by *Barkman*, was entitled to be paid in preference to *Lytle's* judgment creditors.

The case was argued by *Rodgers* and *Hopkins*, for the plaintiff in error; and by *Buchanan*, contra.

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For the defendant, it was contended, that on the day of sale, *Lytle* had the possession and an equitable title; a right to the legal title, on payment of the residue of the purchase money. *Barkman* had the legal title, subject to be divested on payment of the purchase money. The proceeds of sale of *Lytle's* interest in the land ought to be applied to the discharge of liens upon his property, held by his creditors, and not to other persons, in the situation of *Barkman* and his creditors. The latter have no claim to this money. *Lytle* had an interest subject to execution and sale by the sheriff, and the purchaser, according to the conditions of sale, bought all his interest, but the sale had no effect on *Barkman's* title. That remained, and he might sustain ejectment for the land. 1 *Yeates*, 12, 393. *Irvine v. Campbell*, 6 *Binn.* 118. 4 *Johns.* 216. The purchaser cannot complain, for he buys at sheriff's sale, at his own risk. 5 *Serg. & Rawle*, 223. A prior mortgage is not affected by a subsequent judgment, and execution, and sale, by the sheriff. *Febiger v. Craighead*, 4 *Dall.* 151. 2 *Yeates*, 42. He need not take the money from the sheriff. It could not be that he could take his balance of purchase money out of this fund, or not, at his pleasure.

For the plaintiff, it was said, that *Barkman*, or his mortgagee were entitled. *Lytle* became, from the time of sale, the owner of the land, and *Barkman* had only an equitable lien, by virtue of which he had a right to demand the money of the sheriff. The debt of *Barkman* constituted an equitable incumbrance, and equitable incumbrances are paid according to priority. 1 *Fonb.* 310. This court has exercised the power of appropriating the money arising from sales made by sheriffs. *Patterson v. Sample*, 4 *Yeates*, 315. In the *Bank of North-America v. Fitzsimmons*, 3 *Binn.* 358, the Chief Justice says, that "it has been a practice of long standing in this state, when the sheriff sells land by virtue of an execution, to sell it for its full value, without regard to the lien of judgments, and to apply the purchase money to the discharge of those liens, according to their order." It is of great importance that lands sold by the sheriff should bring their full value, which cannot be unless the purchase money be applied to pay off incumbrances of every sort. The intent of the sale, in this case, was, that the full value should be paid, and the money applied to pay incumbrances of every kind in their order, according to the practice, and the legal policy of *Pennsylvania*, since the act of 1700, 1 *Sm. Laws*, 7, and it was so understood by the purchaser. It will be a surprise upon him if he does not obtain a clear title. If *Barkman's* claim is a lien, why should it not be paid as well as a prior judgment or mortgage? It is in nature of a mortgage. In *Levinz v. Will*, 1 *Dall.* 430, the proceeds of sale were applied to the mortgagee holding an unrecorded mortgage. In *Petry v. Beauvarlet*, 1 *Binn.* 97, the court allowed the sheriff poundage on money paid on account of a prior mortgage. As soon as the agree-

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ment of sale was made, the vendee became a trustee for the vendor for the purchase money. *Sudg.* 120. *Pow. on Cont.* 56 to 59. *Barkman* is a judgment creditor for this very money: and though his judgment was subject to *Auwerter's*, it binds from the time the lien accrued, namely, the time of the agreement to sell. It is not merged in the judgment. *Bantleon v. Smith*, 2 *Binn.* 146. *Gordon v. Correy*, 5 *Binn.* 552. At all events, the mortgagee of *Barkman* had a right to payment out of the money. His was the oldest incumbrance. And as *Barkman* has paid this mortgage by a sale of his other property, he has a right to take the place of the mortgagee, and come in to indemnify himself, on the fund in the sheriff's hands.

The opinion of the court was delivered by

TILGHMAN, C. J. The judgment of the court below, in this cause, was given upon a case stated, which may be explained in a few words. *William Lytle* made a parol contract for the purchase of a tract of land of *John Barkman*, for the sum of 12,348 dollars. He paid about 6000 dollars of the purchase money to *Barkman*, who delivered him the possession, but did not make a conveyance of the land. While *Lytle* was in possession several of his creditors obtained judgments against him, on one of which judgments execution was issued, and all his right to this land sold by *John Mathiot*, the defendant, sheriff of *Lancaster* county, for the sum of 5202 dollars. This money was received by the defendant and is still in his hands. It is claimed by *John Barkman*, for the balance of the purchase money due to him from *Lytle*, and it is also claimed by the judgment creditors of *William Lytle*, who contend that they had a lien on the estate of *Lytle*, of whatever nature it might be. The question is, which of these claimants are entitled to the money. If the judgment creditors are entitled, then the judgment of the District Court is to be affirmed; but if *Barkman* has a better right, the judgment must be reversed.

By the law of *Pennsylvania* all the real estate of the debtor, whether legal or equitable, is bound by a judgment against him, and may be taken in execution and sold for the satisfaction of the debt. At common law, an equitable estate is not bound by a judgment or subject to an execution. But the creditor may have relief in chancery. We have no Court of Chancery, and have therefore from necessity established it as a principle, that both judgments and execution have an immediate operation on equitable estates. We must consider then, what was the nature of *William Lytle's* estate in the land sold by the sheriff. It is very clear that he had only an equitable estate. The legal estate remained in *John Barkman*, who had a right to retain it, until he received full payment of the purchase money. On the other hand, *Lytle* had a right to call for a conveyance on payment of the balance of the purchase money. The judgment creditors of *Lytle* had a lien on his estate such as it was. And when the sheriff sold the estate of *Lytle* he sold it

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such as it was; that is to say, a right to demand a conveyance of the legal estate from *Barkman*, upon payment of the balance of the purchase money due from *Lytle*. Of the right of *Barkman*, the purchaser from the sheriff was bound to take notice at his peril. If he examined the title he would find that *Lytle* had not the legal estate; and if he did not examine it, the fault was his own. The sheriff had no authority to sell the estate of *Barkman*, nor could he in any manner affect it. The process by virtue of which he sold, commanded him to sell the estate of *Lytle*. It being the estate of *Lytle* then which was sold, the proceeds of sale belong to those creditors of *Lytle* who had a lien on his estate. The interest of *Barkman* was distinct from the interest of *Lytle*. *Barkman* had no concern either in the sheriff's sale, or the proceeds of sale. He retained the legal title, and might recover in an ejectment against the purchaser at the sheriff's sale, who stood in the place of *Lytle*, so far as concerned the title to the land. The case of *Lytle* was altogether different from that of a man seised of a legal estate in fee, subject to the incumbrance of judgments, &c. There, when the sheriff sells, he sells the legal estate, and it has been the custom to apply the proceeds of sale to the discharge of the incumbrances according to their priority. But inasmuch as *Lytle* had not the legal estate, the proceeds of sale were applicable to the discharge of the incumbrances on his equitable estate. This equitable estate must be supposed to be valuable; for *Lytle* had paid about 6000 dollars for it. His judgment creditors therefore had a lien on something substantial. But according to the doctrine contended for by the defendant's counsel, the judgment creditors lose every thing, and the purchaser at the sheriff's sale gets the legal title for nothing. The purchaser, who bought only an equitable title, is to apply his money in the first place to the payment of the balance due to the holder of the legal title, *which he did not buy*, and thus he will obtain a complete title, both legal and equitable, and the judgment creditors of *Lytle* will get nothing. A principle which leads to such a result must certainly be unsound. But it has been said, that as it is the custom in *Pennsylvania*, to permit the purchaser at sheriff's sales, to apply the money to the discharge of incumbrance, and thus obtain a clear title, the purchaser in the present instance supposed, that he was to have the same privilege, and will be very much injured if it be denied to him. To this it may be answered, that the purchasers at those sales buy at their own peril. There is no warranty of title, and therefore it is, that the property generally goes off at a price far below its value. Nevertheless there may be cases, where under a misapprehension of the terms of sale, the purchaser may be so much injured, that it would be unjust to hold him to his bargain. For instance, if in the very case before us, the sheriff had given cause to suppose, that the purchaser was to have a complete legal title, and on that presumption he had bid the full value of the clear legal estate, it would be

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very hard that after paying his money, he should have to buy the legal title over again. But it was his business to inquire into that matter before the money was paid, and had he brought such a case as I have mentioned, before the court, he would probably have been discharged from the purchase, and a new sale ordered. But there is no such question now for consideration. The case presented to us, is that of a man who purchased only an equitable estate, and we are to decide who is entitled to the purchase money. The answer is plain, those are entitled who had liens on the equitable estate. As the principle involved in this case is important, I have given it full consideration. I can see no ground on which *John Barkman's* claim to the money in the hands of the defendant can be supported. It follows, that it must belong to the judgment creditors of *Lytle*. I am therefore of opinion that the judgment of the District Court should be affirmed.

Judgment affirmed.

[LANCASTER, May 19, 1823.]

SHARE, Bail of VANLEAR, *against* HUNT and Another.

IN ERROR.

A recognizance of bail in error is forfeited, if the plaintiff in error *non pros* the writ by agreement with the other party, provided there be no fraud or collusion.

On the replication *quod habetur tale recordum*, and issue, where the record is a record of the same court, the mere entry of judgment by the court, without fixing a day, though informal, is regular, under our practice.

It seems fraud in *nonprossing* a writ of error, cannot be taken advantage of in a suit on the recognisance, under the plea of a *nul tiel record*, for payment, but ought to be specially pleaded.

ERROR to the Court of Common Pleas of Lancaster county.

The action in the court below was a *scire facias* on a recognisance of bail in error, brought by *Thomas Hunt* and *Israel Fisher*, plaintiffs below, against *Henry Share*. By the evidence filed with the opinion of the court, it appeared that *Hunt* and *Fisher* had recovered judgment in the same court, against *Vanlear*, on an award of arbitrators, on which a writ of error from the Supreme Court was taken out. *Share* became the bail in error, and entered into a recognisance, in the sum of 1500 dollars, to the plaintiffs, *Hunt* and *Fisher*, conditioned, "that he (*Vanlear*,) would prosecute the writ of error with effect, and, in case the said judgment should be affirmed, should pay the judgment, damages, and costs in in the former judgment affirmed; and also damages and costs to be awarded for delay of execution." Afterwards, on the 21st June, 1816, the plaintiffs, *Hunt* and *Fisher*, took from *Vanlear* an agreement, signed and sealed by him, of the following tenor: "I agree,

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that the writ of error sued out to the Common Pleas of *Lancaster* county, in the cause in which *Hunt* and *Fisher* are plaintiffs, and *Isaac Vanlear* defendant, brought to *April* term, 1816, shall be *non-prossed* on the third *Monday* of *May* next, at the meeting of the Supreme Court for the *Lancaster* district, and no other writ of error shall be sued out in this cause. Given under my hand and seal, at *Lancaster*," &c. The plaintiffs accordingly entered the *non pros*.

The record stated the proceedings in this suit in the court below as follows: *June* 8, 1818. The defendant pleads payment, with leave, &c.; *non solvit* and issue, and *nul tiel record*. Plaintiffs' reply, *quod habetur tale recordum*, and issue. *May* 14, 1819. Verdict for plaintiffs, for 1017 dollars 75 cents, and judgment.

The court below charged the jury as follows:

It is attempted to enter into the merits of the original proceedings against *Vanlear*, and it is alleged, that the judgment was irregular and void. I am of opinion, that we have no concern on this trial with any error or irregularity in the original judgment of *Hunt* and *Fisher* against *Vanlear*. If there were any irregularity or error in it, there was a time when those errors and irregularities might have been inquired into. That time has passed. It is now sufficient that there is such a judgment remaining on record unreversed. It is treated by the defendant as a judgment, in taking a writ of error upon it, and it is recited as such, in the recognisance into which he and his security entered. No complaint can reasonably be made, that we will not now inquire into the errors and irregularities alleged; inasmuch as the opportunities which have been heretofore afforded to the original defendant of availing himself of them, have not been embraced. Its liability to be reversed cannot, at this time, therefore, be a subject of investigation. Then, the first question arises on the construction of the terms in which the recognisance is drawn up, upon which this suit is instituted. Under the recognisance, in order to save the forfeiture of the 1500 dollars, the defendant in the original action, *Vanlear*, was to do two things: one was, to prosecute the writ of error with effect; and the other, if the judgment in the Common Pleas should be affirmed, to pay the judgment, damages, and costs in the judgment affirmed, &c. If *Vanlear* failed in either of these particulars, his bail became liable. If the writ of error were *non-prossed* or discontinued, or the judgment affirmed, *Hunt* and *Fisher* might proceed against the bail upon his recognisance. In this case the writ of error was *non-prossed*. The *non-pros* was entered by *Vanlear's* counsel, by his voluntary agreement and direction. He had an unquestionable right to have the writ *non-prossed*. It was sued out by himself, for his own benefit, and he was at liberty to withdraw or discontinue it whenever he pleased; nobody had a right to prevent or control him. By this act of his,

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the recognisance becomes forfeited, and *Share* is rendered liable according to its tenor; unless the *non-pross* was suffered in consequence of a collusion with the plaintiffs, and with a fraudulent design of fixing the bail of *Vanlear*. Fraud vitiates every transaction, and if the plaintiffs were guilty of the fraud alleged, they would justly forfeit the benefit of the recognisance, and your verdict should be rendered in favour of the defendant. But fraud is never to be presumed. It ought to be proved to your entire conviction. To justify your finding a verdict for the defendant, you ought to have full and satisfactory evidence of a collusion between the plaintiffs and *Vanlear*. If you have not this full and satisfactory evidence, this case would in point of law, in my opinion, be clearly in favour of the plaintiffs.

To this charge the defendant excepted.

It was assigned for error,

1. That the plea of *nul tiel record* was tried by jury.
2. The bail was discharged by the negotiations which took place between the original plaintiffs and the principal, without the knowledge of the bail.
3. The recognisance was not forfeited, as the cognisance of the cause was improperly withdrawn from the Supreme Court, by the original plaintiffs and the principal without the knowledge of the bail, by which a reversal was prevented, and an affirmance never obtained.

Hopkins, for the plaintiff in error.

1. The plea of *nul tiel record* was tried by jury. The evidence returned shows, that the record was read to the jury. There is no judgment rendered by the court in relation to it; no day given to bring in the record; but the judgment rendered on the verdict.

2. The bail in error was discharged. The condition of the recognisance is, that the bail shall pay the original debt and damages and costs incurred by the writ of error, in case the judgment shall be affirmed. But the judgment never was affirmed: the writ of error was *non-prossed* by the agreement of the principal; and it was further stipulated, that no other writ of error should be sued out. This was in derogation of the rights of the bail, who relied on the error, which he was advised was in the record, and of this he ought not to be deprived. Bail are always favoured: they are not bound beyond the letter of their engagement, nor if there be any variation from their agreement. The presumption is, that the plaintiffs were parties to this agreement, and on its face it bears marks of collusion. He cited 10 *Johns*. 327, 180. 2 *Caines's Cas. in Er.* 1. 1 *Vern.* 196. 2 *Vern.* 393. 2 *Bro. Ch.* 578.

Slaymaker and *Buchanan*, contra.

1. The cause was tried on the plea of payment, which admitted the recognisance. The plea of *nul tiel record* was put in during the trial. The record was not read to the jury by the plaintiffs, but by the defendant, who wished to enter into the regularity of

(Share, Bail of Vanlear, v. Hunt and another.)

the original judgment. The charge of the court makes no mention of the issue *nul tiel record*. The judgment entered generally by the court decides the issue of *nul tiel record*, as well as the matters determined by the verdict of the jury.

2. The defendant gave no evidence of fraud or collusion: the subscribing witness to the agreement was not called. In truth, it was the mere act of *Vanlear* himself; and the language it speaks is entirely his language, though it is called an agreement. He had a right to *non-pros* his own writ of error, and to stipulate, that he would not sue out another. It is well settled, that the recognisance of bail in error is forfeited by a *non-pros*, or discontinuance of the writ of error. 2 *Tidd's Pract.* 998. A bond on a *homine replegiando* is forfeited, if the plaintiff suffer a nonsuit. 1 *Johns. Cas.* 23.

Reply. The words, "it is agreed," show two parties to the writing. There was no proof that the bail was ever consulted on the agreement.

The opinion of the court was delivered by

DUNCAN, J. This was a *scire facias* on a recognisance entered into by the plaintiff in error, as bail in a writ of error on a judgment obtained in the Common Pleas of Lancaster county, by the defendant in error against *Isaac Vanlear*.

The condition of the recognisance was in the usual form, that *Vanlear* should prosecute the writ of error with effect, and if the judgment should be affirmed, pay the judgment, damages, costs, &c, and also the damages and costs to be awarded for the delay. This writ of error was *non prossed*, by agreement of the plaintiffs and defendant; the defendant stipulating that no other writ of error should be sued out. The first plea was, payment with leave to give the special matters in evidence. On the day before the jury was sworn a new plea was added, of *nul tiel record*; to which the plaintiffs replied, *habetur tale recordum*. The plaintiff in error contends, that the recognisance was not forfeited, inasmuch as the judgment was not affirmed, but the writ *non-prossed*.

The law must be very defective, if this were so. The object in requiring security for payment of the judgment to render the writ a *supersedeas* to execution, is, to secure the party who has obtained the judgment from the injury and loss of the debt, that might arise from this interruption and delay of execution. But this would be an ineffectual and abortive security; and if an embarrassed debtor can delay and suspend the execution by giving bail, and then neglect to prosecute his writ, return the record, or assign the errors, and thus discontinue his writ and screen his bail, then the giving bail in error is a mere ceremony, and nearly as idle as the warranty of a common vouchee in a recovery. There would be no difficulty in procuring bail, for the bail could be exposed to but little risk, where the writ of error, as in too many cases, is for the mere purpose of delay. *John Doe* would be as good bail as the most substantial yeoman. The opinion of the court was entirely right;

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for the essence of the recognisance is, the prosecution of the writ, and the not so doing exposes the bail to the payment of the judgment as much as if it were affirmed; the condition is not complied with, and the obligation to pay the money is the consequence of this non-performance. This doctrine is contained in every book of practice, and it is so much the dictate of common sense, that it is unnecessary to spend further time in proving so plain a proposition; and this disposes of the second and third assignments of error.

If it were true in fact, that the issue of *nul tiel record* was tried by the jury, this would be a fatal objection; but however inartificially the record is made up, sufficient appears to show that it was not so.

The court first dispose of the plea. They state, that they have no concern with the alleged error or irregularity in the judgment; it is only for them to say, whether there is such judgment as is set out in the *scire facias*, remaining of record unreversed: and they say, there is. It required no rule to bring in the record, no time to be allowed the plaintiffs to produce this record. They had it; it was in the court; it was a record of the same court, remitted back by the Supreme Court when the *non pros* was entered. The court decide on the inspection of their own record, and do not leave it to be decided as a fact by the jury, or to be decided by them at all. It might be more formally entered:—but this is the substance. If our records were scanned with the scrupulosity of a special pleader, few records could sustain such inquiry and test; and if every speck which an eagle's eye might discover were a ground of reversal, forlorn would be the hope of a suitor of the termination of his suit within the space of a common life.

The only material question was as favourably treated by the court as the plaintiff in error could honestly require. Fraud will vitiate every proceeding, however solemn, where it operates on the interest of third parties not participating in the fraud, and the court properly leave it to the jury to decide, whether the *non pros* was in consequence of a collusion between the plaintiffs and defendant, and with a fraudulent design of fixing the bail, and if they found it was a continuance to fix the bail, they were then most properly told the verdict should be in favour of the bail. But I rather incline to think, that the fraud could not be given in evidence on the plea of payment or *nul tiel record*, till the defendant should have pleaded that the writ of error was *non-prossed per fraudem*. As in an action against an executor who pleaded a judgment and no assets *ultra*; the plaintiff replies, that the judgment was obtained and kept on foot by fraud. This is the course, and should have been adopted here. But the plaintiff in error has no cause of complaint. He had the full benefit of his allegation of fraud, as if it had been pleaded in the most special and technical form.

Judgment affirmed.

[LANCASTER, May 19, 1823.]

KING and another, Administrators of KING, *against* DIEHL and another.

IN ERROR.

Where judgment below is reversed, and a *venire de novo* awarded, if, on another trial, the opinion of this court is read to the jury by one party, the other may read the charge of the court below, to explain the opinion, though not as evidence of law or fact.

If a legacy be payable in instalments, and the date of the last instalment expire before the testator's death, it is to be considered as a legacy payable generally, and carries interest from one year after the testator's death.

Where the defendant pleads payment to a bond, with leave to give want of consideration and special matters in evidence, he can only give such matters in evidence as show that the plaintiff has no right to recover; but when he pleads payment with leave to give defalcation in evidence, he may give in evidence matter entitling him to recover against the plaintiff under the defalcation act.

Where the defendant paid money to the plaintiff, which both parties thought the plaintiff was entitled to, but it afterwards turned out that the plaintiff was not entitled to it, held that interest ought not to be paid by the plaintiff till the defendant explained the mistake and demanded repayment.

Where, in this state, a legacy is granted to one, and afterwards over on the happening of a contingent event, the executor ought not to pay to the first legatee without security, if required to take security by the legatees over; and on action brought by the first legatee, the court would require security before execution issued.

But if such payment be made with the consent of all parties concerned, the executors would not be liable to the legatees over.

If a guardian pay to his ward a legacy bequeathed to him, then to others on a contingency, if that contingency happen, the guardian cannot recover it back as trustee for the legatees over; though the legatees themselves might recover it.

DEBT by *Philip J. King* and *Charles A. Barnitz*, administrators of *Henry King*, deceased, against *Daniel Diehl* and *Nicholas Diehl*, on a single bill, dated the 9th June, 1814, executed by the defendants for the sum of 481 pounds, 11 shillings, and 6 pence; payable to *Henry King, Jr.*, or order, on the 1st September, 1814, and assigned by *Henry King, Jr.*, to his father *Henry King*, the intestate. The defendant pleaded, "payment with leave to give mistake, want of consideration, and special matters in evidence."

On the trial in the court below, the defendants, who were the guardians of *Henry King, Jr.*, alleged, that the consideration of the single bill was a legacy bequeathed to the said *Henry King, Jr.*, by the will of his grandfather *Peter Diehl*, made the 6th January, 1801. The bequest of this legacy was as follows: "I also give and bequeath unto *Henry King* my grandson, (the issue of my daughter *Elizabeth*, deceased, who was intermarried with *Henry King*,) and to his heirs and assigns, the sum of 1000 pounds, in real gold and silver money current in *Pennsylvania*, to be paid to him in 200 pounds yearly payments, the first payment whereof to be made in 1808, and from thence 200 pounds successively until the whole shall be fully paid; nevertheless, if the said *H. King*

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shall die unmarried and without issue, that then, and in such case, the sum aforesaid so bequeathed, shall be equally divided to and amongst all my children, share and share alike."

The executors named in this will were *Peter Diehl* and *Jacob Diehl*, two of the testator's sons. The testator died in 1812. *Henry King, Jr.*, the legatee, transferred all his right and interest in the single bill, by an assignment under seal, in the presence of two witnesses, on the 19th *September*, 1815, to his father, *Henry King*, the intestate. He was 21 years of age in the year 1814, and died in the year 1816 unmarried and without issue.^(*) The defendants had given another obligation to *Henry King, Jr.*, at the same time they gave the one now in suit, payable on the 1st *May*, 1815; and together they amounted to the legacy of 1000 pounds. The other obligation was also assigned by *Henry King, Jr.*, to the intestate; and payments were made by the defendants to the intestate from time to time, on account of these obligations to the amount of upwards of 2000 dollars.

On the same day on which the single bills were given, namely, the 9th *June*, 1814, certain other instruments of writing were executed. 1. An agreement between *Henry King, Jr.*, and *Nicholas, Jacob, and Daniel Diehl*, executed by the said *H. King, Jr.*, reciting that the testator, *Peter Diehl*, had bequeathed all his lands and mills to his said sons, *Nicholas, Jacob, and Daniel*, the said *H. King, Jr.*, in consideration of the payment to him of 1000 pounds by the said *Nicholas, Jacob, and Daniel Diehl*, released all his claim to and shares in all messuages, plantations, and tracts of land, devised to them by the said *Peter Diehl*. 2. An acknowledgment by *H. King, Jr.*, under seal, that he had received of *Nicholas and Daniel Diehl*, his guardians, duly appointed by the last will of *Peter Diehl*, 1000 pounds in full satisfaction of all legacies, and of his share of the estate real and personal of his late grandfather, *Peter Diehl*: and a release in full to them as guardians. 3. An agreement, under seal, executed by *H. King, Jr.*, and *Jacob Diehl*, purporting to be made between the said *H. King, Jr.*, and *Jacob and Peter Diehl*, executors of *Peter Diehl, sen.*, that the executors might sell a messuage, tenement, and saw mill in *York county*, to pay *Peter Diehl's* just debts: they to account to the said *H. King, Jr.*, for the proportionate part of the balance left after the debts were paid.

By the will of *Peter Diehl*, deceased, the testator created a fund for the payment of his debts, &c. viz: all his outstanding debts, several sums of money to be paid by his sons, (to whom he had devised particular parts of his real estate,) the proceeds of certain

(*) See a former report of this case 6 *Serg. & Rawle*, 29, where it was determined, that the limitation over of the legacy being to take effect on the failure of issue at the death of the first taker, was good, and vested the legacy in the children of the testator.

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lands and houses, which he ordered to be sold by his executors, and *all his other personal property*: and he directed that if any surplus should remain after payment of his debts, &c., it should be equally divided among his four sons, *Peter, Nicholas, Jacob, and Daniel*. Of the sums thus directed to be paid by his sons, there was a surplus after paying debts, &c. of 900 pounds: and as the testator left four sons and one daughter, and the said *H. King, Jr.*, the child of another daughter, who died in his life time, the plaintiffs contended that he was entitled to one sixth of this 900 pounds; and that it formed, in part, a consideration for the compromise under which these single bills were given by the defendants.

The defendants alleged, that the bills were given without consideration: that the payments to the intestate had been made by mistake: and claimed a verdict for the amount they had paid with interest.

The plaintiffs, in their opening, having read the opinion of this court delivered on the former writ of error reversing the judgment of the court below, the defendants afterwards offered to read the charge of the President of the Court of Common Pleas delivered on the first trial, which was filed of record in the court below. The defendants objected, but the court below allowed it to be read and the plaintiffs excepted.

The court charged the jury upon several points presented to them by the plaintiffs and defendants. The matters contained in the charge, so far as they are material, appear in the errors now assigned in this court, which were as follows:

1. The court erred in admitting in evidence the charge delivered by them upon the former trial.

2. The court erred in instructing the jury, that no interest could be legally charged on the legacy given to *Henry King, Jr.*, until the expiration of one year after the testator's death.

3. In instructing the jury, that the defendants had a right to claim from the plaintiffs, any money they could show was paid to *Henry King* in his life time through mistake, and without consideration; and that if the jury believed, that the note now in suit, and the one given at the same time, and for the same sum, which the defendants gave to *Henry King* in his life time, were given for the £1000, then, as the legacy was not a lawful consideration for the notes, the whole money paid on both of them with the interest, could and ought to be recovered back in this suit, by the verdict of the jury in favour of the defendants, and that *law and justice should require it to be so done*.

4. In instructing the jury, that the sum of money charged by the will of *Peter Diehl*, on the lands thereby devised to his sons, and to be paid by them, was part of the testator's personal estate, and, so far as not otherwise disposed of by his will, was bequeathed to his four sons by the will, after the debts were paid; and that his grandson, *Henry King, Jr.*, would not be entitled to any part thereof.

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5. The court also erred in instructing the jury, that if money be paid by one man to another, through a plain mistake, the person so paying it had a right by law to recover it back, whether the person receiving it did or did not know of the mistake, and although he thought he had a right to receive it.

6. In instructing the jury, that the payment made by *Nicholas* and *Daniel Diehl* to *Henry King, Jr's.*, assignees after his decease, and with full knowledge of that fact, are not such acts as would prevent them from setting up the limitation over of the legacy as a defence against the notes in the assignee's hands.

7. In instructing the jury in the following terms, to wit: The answer of the plaintiff to the defence set up in this case is, that the notes were not given for the legacy alone, but the defendants, aware that *Henry King, Jr's.*, legacy would absolutely vest in him on his marriage, and presuming on the probability of his marriage, knowing that he was entitled to a share of the estate of which *Peter Diehl* died intestate, and perceiving a controversy likely to arise with him on account of it, for the purpose of preventing all controversies which might arise, and to obtain his consent to a sale of the mill property for the payment of the debts of his grandfather, entered into agreement with him to accomplish those objects, gave these notes in full of all his claims upon the estate, and obtained his release of all demands. If you are satisfied, from the evidence in this cause, that this was the case, then your verdict ought to be in favour of the plaintiff, for the amount of this note, with the interest from the time it became due. If you are not satisfied, from the evidence, that this was the case, then your verdict ought to be in favour of the defendants, for such sum as is equal to the amount which has been overpaid to the intestate.

8. And the court erred in instructing the jury, in answer to the *second* proposition of the plaintiff, in this particular; that the jury were not informed, that the circumstances relied upon by the plaintiff precluded the defendants from setting up as a defence against the payment of the notes, an alleged mistake, concerning a matter which appeared on the face of the will of *Peter Diehl*; but they were informed that such circumstances did not preclude the defendants from showing any mistake, if they could do it.

Barnitz, for the plaintiffs in error.

1. It was improper that the court below, should permit their former charge to be read to the jury, when the judgment had been set aside by this court, for the errors in that very charge. It could have been read with no other view than to influence the jury: and could only mislead them. It contained the judge's statement of facts, as well as his opinion on matters of law. A verdict of a former jury cannot be read in evidence, if the judgment has been arrested or reversed. In *Shaeffer v. Kreitzer*, 6 Binn. 430, it was determined, that upon an appeal from an award of arbitrators, the award cannot be read to the jury.

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2. The court erred in saying that interest was not due on the legacy till one year after the death of the testator. The act of 21st *March*, 1792, provides, that where no time is limited in any last will or testament, for the payment of legacies, that then the executors shall have the space of one year to discharge them. But the act does not apply in this instance, because there is a time limited: and therefore the executor is not entitled to the delay of one year.

3. The defendants were not entitled to recover of the plaintiffs, any money paid by mistake, or without consideration, as the case stood at the trial, because this was not pleaded, nor had any notice been given by the defendants of such claim. The defalcation act of 1705, 1 *Smith's Laws*, 49, sect. 1., authorises the defendant "to plead payment of all or any part of the sum demanded," and "if it shall appear, that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much;" but by the 10th section of the act of the 14th *February*, 1729—30, 1 *Sm. Laws*, 185, where there are mutual debts there cannot be a set-off, unless on pleading the general issue notice be given of the particular sum or debt intended to be insisted on, and upon what account it became due. And in *Boyd's Executors v. Thompson's Executors*, 1 *Sm. Laws*, 42, it was decided, that the demand of the defendant, not having been pleaded nor notice given, it could not be admitted in consequence of the provisions of the act of 14th *February*, 1729—30. But interest was not recoverable by the defendants, under any plea or notice. Interest is not due on recovery of money paid by mistake, where neither fraud nor surprise can be imputed to either party. This was expressly decided in *Jacobs v. Adams* 1 *Dall.* 52, where money was recovered back from executors, who had received it under the authority of a will, afterwards set aside. So in *Brown v. Campbell*, 1 *Serg. & Rawle*, 176, it was held, that if the plaintiff's money be improperly applied to the defendant's use, the defendant is in no default till informed of this fact, and therefore, ought not to pay interest.

5. The court erred in saying that *H. King, Jun.* was not entitled to his share of 900 pounds, being the amount of money charged on the lands beyond the debts and legacies, and not particularly disposed of.

5. The court laid down the law too broadly. They should have stated the exceptions. Money voluntarily paid with full knowledge of all circumstances, or with the means of obtaining such knowledge, cannot be recovered back. 1 *Esp. N. P. (Gould's) part. 1. pa. 5.* Money paid with a knowledge of facts but through ignorance of law, cannot be recovered back. *Ib.* 192. 2 *Com. Cont.* 40. *Chitt. on Bills*, 250.

6. This error was relinquished for the present.

7. The court in their answer objected to in the assignment of this error, confused the jury by throwing the plaintiff's reply,

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which consisted of many parts, into one, and telling the jury, that if they were satisfied of the whole, they would find for the plaintiffs; whereas if any of the grounds taken by the plaintiffs, were true, the verdict ought to have been for the plaintiffs. In *Bailey v. Fair-play*, 6 Binn. 455, this court held the charge of the court below to be, upon the whole, incorrect, though so far as the judge went, he was correct: because he stated only *part of the law*, and the jury were thus suffered to fall into an error, by which the defendants were injured. The instructions ought not to be given in such a manner as to mislead the jury.

8. The jury ought to have been informed that the instruments executed on the 9th June, 1814, showed a final settlement and compromise between the parties, of all controversies, and precluded any allegation of mistake of right. In *Pullen v. Ready*, 2 Atk. 607, HARDWICKE, Lord Chancellor says, that if parties are entering into an agreement, and the very will, out of which the forfeiture arose, is lying before them and their counsel, while the draughts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point, and shall not be relieved, under a pretence of being surprised, with such strong circumstances attending it. So in *Perkins v. Gay*, 3 Serg. & Rawle, 327, it was held, that where parties treat on the basis that the fact which is the subject of agreement is doubtful, and the consequent risk each is to encounter, is taken into consideration, in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties: provided there be no concealment or unfair dealing by the opposite party, that would affect the other. There does not appear to have been any concealment or fraud in the arrangements of the 9th June, 1814, and, being a family settlement, for the purpose of terminating all disputes, the parties to it are concluded, and cannot now aver mistake or misapprehension.

Cassat and *Hopkins*, contra, premised, that *Peter Diehl* had four sons, and two daughters, one of whom, *Elizabeth*, was the mother of *H. King*, Jun., and died in her father's life time: the other daughter, *Catharine*, survived the testator. The defendants, who were the guardians of *H. King*, Jun., were in nature of securities for him, that in case of his death unmarried, the money should be paid to the legatees over, namely the five children of *Peter Diehl*. Two fifths of this legacy, in that event, belonged to the defendants. When the defendants executed these single bills, they intended to pay *H. King*, Jr. only the interest, until he was married: and then he would have been entitled to them absolutely. But they were drawn payable absolutely, by a blunder of the scrivener. They then considered the errors assigned.

1. The charge of the court below was not read by the defendants until the opinion of the Supreme Court reversing the judgment, had been read by the plaintiffs. The charge was in favour

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of the plaintiffs who recovered on the former trial. But we offered it in order to explain the opinion of the Supreme Court, when they reversed the first judgment, and the court admitted it with a direction to the jury, that the charge was not to be considered as establishing any fact. Suppose the whole case had been reported, could not the charge of the court be read, as well as the part containing the opinion of the Supreme Court?

2. As to the time when the interest on the legacy should commence, the court charged too strongly in favour of the plaintiffs, because the interest of the testator was that the legacy of 1000 pounds should be paid at five equal annual instalments, without interest on any until the time of payment had elapsed: whereas the charge was that the whole legacy bore interest from the end of one year after the testator's death. But as the times of payment had all passed before the death of the testator, let it be considered as a legacy payable at no fixed time, and then it is governed by the act of assembly, and is payable at the end of one year after the testator's death. This is not a legacy to be paid out of funds to be raised by the executors by the sale of land, and from personal property, and is not a legacy charged on land. 2 *Johns. Cas.* 300. Another objection under this head is, that the court charged that the money paid by mistake with the interest due thereon should be recovered back by the defendants. On the subject of interest our courts adopt a more liberal rule than the *English*. This action was commenced within two or three months after the money paid: and if the jury have allowed interest, it was a matter within their discretion. The court will support a verdict, by any intendment it can be supported. 2 *Wils.* 2. In 4 *Dall.* 279, it is held, that interest should be allowed where one retains money of another against his will.

3. Under our plea of payment, we were entitled to give in evidence monies overpaid, and to recover a verdict for that amount. The act for defalcation, passed in the year 1805, expressly authorises this course, and requires nothing more of the defendant than the plea of payment. Under the 23d rule of the court below, notice or specification is necessary, only where it is demanded by the plaintiff. This rule is that, "where leave is given to alter a plea, or, under a general plea, to give the special matter, fraud, want of consideration, particular payments, or defalcation, in evidence, the alteration of the plea shall be made, and a specification of the special matter, fraud, want of consideration, payment, or defalcation shall, *if demanded*, be furnished to the opposite party, or attorney, in one month after issue joined, or in some term preceding that in which the trial shall be: otherwise, no alteration shall be allowed, nor any evidence admitted of the special matter required to be specified." It not only does not appear that any demand was made, but it does not appear that on the trial any objection was made to the special matters offered by the defendants. As to the act of 1729—30, it is confined altogether to insolvent debtors: and it is plain from

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the rule of court, that it was not considered to embrace any other cases.^a

4. As to the interest of *H. King, Jr.*, in the surplus paid by the devisees of the lands, beyond what would satisfy the debts and legacies, this is a question of intention, arising on the will. The testator intended to give his grandson, *H. King, Jr.*, 1000 pounds, and no more. All the residue of the personal property was given to the testator's four sons. The money which he ordered his sons to pay was made part of his personal property, and, therefore, all the surplus, whatever it might be, being personal property, passed to the four sons.

5. The charge of the court is complained of, because it stated, that money paid by mistake could be recovered back, although the party to whom it was paid, thought he had a right to receive it. Nothing can be more correct than this proposition. It is objected, that a mistake in law is no ground for recovering money back: this, however, is unreasonable, because a mistake in law has the same effect in misleading an innocent person, as a mistake in fact. Besides, the maxim *ignorantia juris neminem excusat*, is applicable only to criminal cases. In *Farmer v. Arundel*, 2 *Bl. Rep.* 825, DE GREY, C. J. says, when money is paid by one man to another, on a mistake either of fact or of law, or by deceit, assumpsit for money had and received, will certainly lie: though an action will not lie to recover back money paid by one who was bound in point of honour or conscience to pay another. To the same point are the following authorities: 2 *Com. Cont.* 35. 1 *Salk.* 22. 2 *L. Ray.* 1217. 2 *Bl. Rep.* 825. 3 *Burr.* 1354. *Doug.* 637. 2 *Johns.* 157. In this case the mistake of law was an excusable one: for the court of Common Pleas decided that *H. King, Jr.* had an absolute property in this legacy, though the Supreme Court afterwards determined the contrary.

6. Payments made to the assignee, after the death of the assignor, cannot operate to deprive us of our redress. The assignee is in no better condition than the assignor. The plaintiff was no more than the donee of his son. It is alleged, that it was the duty of the defendants to pay the assignee of *H. King, Jr.*, and then resort to the administrators of *H. King, Jr.* But this is a circuity of action, to which it would be oppressive to compel the defendants to resort.

7. It is not denied that the opinion of the court was right. If a more detailed charge were wished by the plaintiffs, it should have been asked for. As it was delivered, however, it presented the case of the plaintiffs in a strong point of view. There was no consideration for this note if *H. King, Jr.* was entitled to this legacy only for life. The consideration was the payment of the legacy:

(*) The first thirteen sections of this act of 14th February, 1729—30, were repeated by the 20th section of the Insolvent Act, passed the 26th March, 1814. *Pamph.* 222.

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but only 400 pounds of the 1000 was due. The legatee was not entitled to payment without giving security to the legatees over.

8. Then as to the alleged compromise, and the effect of the instruments executed on the 9th *June*, 1814, these were all left to the jury to decide upon, and they were told, that if they were satisfied on the subject, they should find for the plaintiffs.

Buchanan, in reply:

1. We complain that the charge was read to the jury as evidence, and not by way of explaining the judgment of the Supreme Court. The opinion of the Supreme Court had not been read by the plaintiff as evidence, but to show the law. The object of the defendants in reading the charge was, to make an impression on the jury in respect to matters of fact, to induce them to believe that the sole consideration of the single bills was the payment of the legacy. The cases cited from 6 *Binney*, are conclusive. As to reports of adjudged cases, they cannot be read to the jury as evidence.

2. We contend, that the legacy was due immediately on the testator's death. The testator, supposing he should die in a short time, his grand son *H. King*, Jr. being then 8 years old, fixed for the payment of the first instalment the 1st *May*, 1808, when the legatee would be between 15 and 16 years old, because money would then be peculiarly necessary for his education. The last payment would in that case have become due just before the legatee came of age. But as the testator lived till *H. King*, Jr. was 21, the intent of the will would be best answered by the legacy's becoming payable immediately on the testator's death. At any rate, this legacy being charged on land, it carried interest.

3. On this point there are five questions. 1. Can money paid under mistake of law be recovered back? 2. Can it be recovered under the pleadings in this cause? 3. Can interest be recovered? 4. Can money paid by mistake be recovered from the assignee of a bond? 5. If it can, are the defendants the proper persons to recover it?

1. As to 400 pounds of the 1000 pounds legacy, the defendants were dealing in their own rights: because as two of the legatees over, they were entitled to two-fifths. There was no concealment or mistake of facts. The only question then is, whether a mistake in their legal rights can now be taken advantage of by them, to recover back the money paid. In this, ancient and modern authorities concur. Ignorance of the deed may excuse, but ignorance of the law excuseth not. *Doct. & Stud.* 79, 152, 251. If money be paid by one with full knowledge, (or with full means of knowledge in his power,) of all the circumstances, it cannot be recovered back again on account of such payment having been made under an ignorance of the law. 2 *Com. Cont.* 39. The defendants, when they paid, were well aware of the fact that *H. King*, Jr. was dead: and if they mistook in the legal consequence, that his right

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to the legacy was then at an end, it is a mistake of which they took the risk, and from which they cannot now be relieved. 2. The real plaintiffs in this cause are the administrators, and the verdict and judgment are against them as administrators: they had therefore a right to reply *plene administraverunt* to an attempt to establish an overpayment, by which they would be rendered liable. If this judgment stands, the plaintiffs are estopped from alleging want of assets, without an opportunity to plead or show it. The rule of court supports our argument that we were entitled to notice: for the defendants should have informed the plaintiffs that they meant to give defalcation in evidence, and then it would have lain on us to demand a specification of that defalcation. It is alleged that this defalcation was given in evidence without objection. But that is not the case. The payments which were the subjects of defalcation, were good evidence in another point of view. We gave them in evidence to support our demand, and then, without notice, the defendants in their address to the jury converted this evidence into a ground for recovering a sum of money against the plaintiffs. Besides, it was evidence for the defendants under their equitable defence. But an equitable defence under the plea of payment, is quite different from defalcation under the plea of payment. The former destroys the cause of action: the latter admits it. 3. Can interest be recovered back? The court charged that law and justice required the payment of interest, whereas this matter should have been left to the jury. In consequence of this charge, the jury gave interest from the time the money was paid. The most they could properly allow, was interest from the time when re-payment was demanded. 4. Can money paid by mistake to the assignee of a single bill be recovered? We contend that it cannot. It must be recollected, that it was a voluntary payment, and one of the bills was given up. It is settled law, that if the obligor knowing of the assignment makes no objection, he is estopped from controverting the consideration of the bond. But the case of payment is much stronger. As the case stands before the court, the assignment is to be taken as made for a valuable consideration. 5. If the money be recoverable, are the defendants the proper persons to recover it? The defendants were the guardians of *H. King, Jr.*, and had received this money from the executors of *Peter Diehl*. The money belongs to the five children of the testator: what right then have the defendants to recover the whole of it, when their title extends only to two-fifths? But in truth, there was no right in any of the children. *H. King, Jr.* had a right to the possession of the principal during his life, and the bond to him was equal to payment. If a man accepts a bond for a legacy the legacy is extinct, 3 *Bac. Ab.* 106. *Yelv.* 38. Nay, *H. King, Jr.* had released the legacy on the 9th *June*, 1814, by an instrument under seal. Whether the executors might have demanded security before they made the payment is another question: they certainly were justified in

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making it voluntarily; and we apprehend they might have been compelled to pay it without security, because the testator did not intend that security should be given.

4. It was only the surplus of a certain fund, and not of the personal estate in general, which the testator gave to his four sons. The money charged on the lands devised to his sons was a different thing. There was no residuary bequest of the whole personal estate.

5. The objection on this head is, that the charge is too general: but it is not necessary to examine it further, as the particular exception, which we say the court ought to have made, namely, that a mistake of the law does not excuse, has been already discussed.

6. We say that the act of paying part to the assignee, is such an admission of the bond as estops the obligor from controverting it. It is full as strong as saying to the assignee, before the assignment, that the bond is good.

7. Our reply consisted of several matters, either of which was decisive. But the court charged, that if the jury believed we had made good all those matters, they should find for us. This was error, because the jury were led to think they might find against us, though they were in our favour on some decisive point.

8. *H. King, Jr.* was 21 in *March*, 1814. The settlement with his guardians was made on the 9th *June*, 1814. At that time he was entitled to one-sixth of 900 pounds, the surplus money before mentioned, if our construction of the will be right: and he was entitled to one-sixth of some land purchased by *Peter Diehl*, after the making of the will, of which he died intestate. Under these circumstances, he executed releases on the 9th *June*, 1814, and received the single bills of his guardians for certain money, for part of which this suit was brought. The release was not only of the legacy, but of other rights. The whole transaction was manifestly a compromise and family settlement. It was evident that the legacy of 1000 pounds was not the sole consideration of the single bills given by the defendants: and there being other considerations moving to the settlement, the parties were concluded from unravelling it, and the court ought so to have charged.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action on a single bill, dated the 9th *June*, 1814, given by the defendants, *Daniel* and *Nicholas Diehl*, for the sum of £ 481 11s. 6d., payable to *Henry King, Jr.*, or order, on the 1st *September*, 1814, with interest from the 1st *May*, 1814. *Henry King, Jr.* assigned this obligation to his father, *Henry King*, the intestate. It was alleged by the defendants that the consideration of the single bill, was, legacy bequeathed to the said *H. King, Jr.*, by the will of his grandfather, *Peter Diehl*, dated the 6th *January*, 1801. The bequest of this legacy was in the words following: "I also give and bequeath unto *Henry King*, my grandson (the issue of

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my daughter *Elizabeth*, deceased, who was intermarried with *Henry King*,) and to his heirs and assigns, the sum of one thousand pounds, in real gold and silver money current in *Pennsylvania*, to be paid to him in two hundred pounds yearly payments, the first payment whereof to be made in 1808, and from thence two hundred pounds successively, until the whole shall be fully paid; nevertheless if the said *H. King* shall die unmarried and without issue, that then and in such case, the sum aforesaid so bequeathed shall be equally divided to and among all my children, share and share alike." *Henry King, Jr.*, the legatee, died unmarried and without issue, after he had assigned the said single bill to his father, without having received payment of any part of the said legacy. He was 21 years of age in the year 1814, and died in 1816. The testator died in 1812. The defendants gave other obligations to *H. King, Jr.*, which he also assigned to his father, *Henry*, to whom considerable payments were made by the defendants after the death of his son. The bonds given by the defendants were to the amount of the said legacy, of 1000 pounds. On the trial of the cause in the court below, exceptions were taken by the counsel for the plaintiffs to the opinion of the court on several points, which I shall proceed to consider.

1. This cause was tried once before, and the judgment of the Court of Common Pleas was reversed by this court on a writ of error. On the last trial, the opinion of this court delivered on the reversal of the first judgment, was read to the jury, after which the counsel for the plaintiff offered to read the charge of the President of the Court of Common Pleas, on the first trial, which was placed on the record. To this the counsel for the defendant objected, but the court permitted the charge to be read. I can perceive no error in the admission of this charge. As the judgment was reversed for error in the charge, there was no impropriety in permitting the jury to have a full understanding of it; especially as the court had the caution to tell the jury, that they were not to consider the charge as evidence of any fact which was stated in it. This is very different from the case cited by the plaintiff's counsel, where it was decided by this court, that the report of referees which had been appealed from, could not be read in evidence to the jury by the party in whose favour the report was, because, after the entry of the appeal, the cause was taken up anew, without any regard to the former proceedings, and therefore the judgment ought not to be influenced by the opinion of the referees. So likewise, this case is quite different from another cited by the plaintiff's counsel, in which it was decided, that a verdict which had been set aside by the court, could not be read in evidence to the jury on the second trial. There would be a manifest absurdity in offering that as evidence which had been annulled by the court. These cases would have applied, if in the present instance, the charge of the court on the first trial, had been admitted as evidence of the law or fact. But, as I understand

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it, the opinion of this court which referred to the charge having been read, the charge itself was afterwards introduced merely as an appendage to the opinion, and in order to enable the jury more fully to comprehend it.

2. The second error assigned, is in the opinion of the court, that interest was not due on the legacy of *H. King, Jr.*, until the end of one year from the death of the testator. This legacy was made payable in yearly instalments of 200 pounds each, the first of which was in the year 1808, so that the last would have been in 1812. But it so happened, that the testator survived all the periods of payment, so that it was impossible the legacy should be paid at the time appointed by the will. The most reasonable construction, under these circumstances, is, that it should be considered as a legacy payable generally, without appointing any time for payment; in which case it would have been payable at the end of a year from the death of the testator. Consequently it did not bear interest until that time, and the opinion of the Court of Common Pleas was right.

3. The third error assigned, is in the court's opinion, that *Henry King, Jr.*, was not entitled to any part of the surplus of the testator's personal estate, which remained after paying all the debts and legacies. This is purely a question of intention. The testator created a fund for payment of his debts, &c. viz: all his outstanding debts, several sums of money to be paid by his sons, to whom he had devised particular parts of his real estate, the proceeds of certain lands and houses which he ordered to be sold by his executors, *and all his other personal property*; and he directed that if any surplus should remain after payment of his debts, &c. it should be equally divided among his four sons, *Peter, Nicholas, Jacob, and Daniel*. There is nothing given to his grandson, *H. King, J.*, except the legacy of £1000; and his intention appears clear, that all his personal property of every kind which remained after payment of his debts, &c. should go to the four sons whom he made residuary legatees of his personal estate. I agree in opinion therefore with the Court of Common Pleas, that *H. King, Jr.*, was entitled to no more than his legacy of £1000.

4, 5, 6. The fourth, fifth, and sixth errors, will be most conveniently considered as one subject. After the death of *Henry King, Jr.*, several payments were made by the defendants to his assignee, *Henry King*, amounting in the whole to upwards of \$2000. The defendants pleaded payment, with leave to give *mistake, want of consideration, and special matters* in evidence. The plaintiffs did not call for a specification of the special matters, as they might have done by the rule of court, and in this manner the cause went to trial. On the trial, the defendants in the first place gave evidence of want of consideration, by showing that the single bill on which the action was founded, was given on account of the legacy of £1000 bequeathed to *Henry*

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King, Jr., by his grandfather, and that by the death of the legatee, the principal of the legacy went over to other persons. All this was right enough. But the defendants did not stop there. They gave evidence also, of all the payments made by them to *H. King* the father, after the death of the son, and contended that under our defalcation act, they were entitled to recover of the plaintiff the several sums which they had paid, *with interest from the time of payment*, and in this the court agreed with them. As this cause will go to another trial, I shall, in order to free it from all embarrassment, consider three questions which appear to be material. First, Under the pleadings in this case, could the defendants recover any thing of the plaintiffs under our defalcation act? Secondly, Supposing they could, would they be entitled to interest on each of the payments made by them, from the time of payment? Thirdly, Under all the circumstances of this case, are the defendants entitled to recover any thing of the plaintiffs? First, then, as to defalcation. When the defendant pleads payment, with leave to give want of consideration, and the special matters in evidence, he can only give such matters in evidence as show, that the plaintiff has no right to recover. He may defeat the plaintiff's action, but there must stop. He can recover nothing against the plaintiff. But when he pleads payment, with leave to give *defalcation* in evidence, he may give evidence of matter which entitles him to a recovery against the plaintiff. The plaintiff, if he will, has a right under the rules of court, to call for a specification of the defalcation; but if he does not call for it in due time, the defendant is left at large to give evidence of any matter which may be defalked under our act of assembly. This I think is the fair construction of the rule of court which has been shown to us; and therefore the defendant had no right under the pleadings in this action, to go into evidence which might entitle him to a recovery against the plaintiff. But supposing he could have gone into such evidence, was the court right in charging that the defendants were entitled to interest *from the time of payment*? I think that matter should have been left to the jury. In liquidated debts, on bond, note, &c. interest may be said to be matter of law. But the present case was very peculiar. The defendants made a voluntary payment to the plaintiffs, and both parties thought that the payment was proper. Both supposed, that the thousand pounds legacy was the absolute property of *Henry King, Jr.* In this they were mistaken. On the death of *H. King, Jr.*, the legacy went over to the children of the testator. But the plaintiffs could not be blamed for receiving what they thought was their right, and what the defendants were willing to pay. Until the defendants explained the mistake and demanded repayment, it cannot be said that the plaintiffs unjustly withheld their money, and should therefore be subject to interest. In *Brown v. Campbell*, 1 Serg. & Rawle, 176, this court was of opinion, that where a man received the money

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of another, supposing it to be his own, interest should not be charged against him until the money were demanded and payment refused by him. The present is a case, which, under all its circumstances should have been left to the jury, and the court was wrong in charging as matter of law, that interest was recoverable from the time of payment. But were the defendants entitled to recover in any form of action, the money which they thus voluntarily paid to the plaintiffs. The legacy of £1000 bequeathed to *H. King, Jr.*, belonged to him, at all events, during his life. Perhaps the executors of the testator might have insisted, that he should give security for payment to the legatees over, in case of his death, unmarried, and without issue. But I do not know that they were obliged to do so. In such a case, chancery would see that security was given, on a bill filed by the legatees over, and with us, who have no chancery, perhaps, on notice from such legatees to the executor not to pay without security, it might be his duty to act accordingly. I think, that on receiving such notice, the executors ought to put the legatee for life to his action, and the court would take care that no execution should issue till security given. But in the present case, so far from giving notice, the parties concerned thought that *H. King, Jr.*, had an absolute property in the legacy. The executors, therefore, who consented that the money should be paid to *Henry King, Jr.*, would not be liable to an action by the children of *Peter Diehl*, whose remedy must be sought against *H. King, Jr.*, or his assignee who received the money. I take for granted that *H. King*, the father, received an assignment of this bond from his son, as a gift, without valuable consideration. But although the executors would not be liable to an action, I will not say whether they might not have supported an action to recover the money paid on account of the legacy as trustees for the children of *Peter Diehl*. That, however, is not the present case, for the defendants are not the executors of *Peter Diehl*, but the guardians of *H. King, Jr.* Now, what right have they to this money? It belongs not to them, but to the children of *Peter Diehl*. The executors of *Peter Diehl* came to an agreement with *Henry King, Jr.*, in consequence of which the defendants gave their bonds to *King*, and he gave the executors a release for his legacy of £1000. The defendants paid part of their bonds, in which they were justified. They are not responsible to the children of *Peter Diehl* for the money so paid, because it was never in their hands as trustees for those children. But the estate of *Henry King*, the father, is accountable, supposing that he received the assignment of the bonds as a gift from his son. There is no reason therefore, why the defendants should be permitted to recover back the money which they paid voluntarily and lawfully. Let it be recovered by the children of the testator, to whom it belongs. Upon the whole, I am of opinion that the judgment should be reversed, and a *venire de novo* awarded.

[LANCASTER, MAY 19, 1823.]

WILSON, Executor of WILSON, *against* HAMILTON, Administrator of WILSON.

A former recovery in an action for money had and received against an executor by the widow is only *prima facie* evidence that the whole amount with which the executor then charged himself in the settlement of his accounts, was recovered: the plaintiff may in another action recover monies received since the bringing of the former suit though contained in the account, if they were not before recovered.

In an action by the widow for her share of the surplus monies arising from the sale of a tract of land ordered by the testator to be sold and undisposed of by will, evidence is not admissible of an action of dower brought by her to recover her dower in another tract belonging to the testator, which is the subject of a different devise.

When a testator orders land to be sold and certain legacies to be paid out of the proceeds, the surplus money after the payment of the legacies does not go to the executor, or to the next of kin, as an undisposed of residue of personal estate, but results to the heir at law.

If the widow in such case bring an action of dower and count therein, this is such an election as would bar her from claiming a share of the money if it were an undisposed of residue of personal estate.

ERROR to the Court of Common Pleas of Lancaster county.

This was an action for money had and received, brought by the plaintiff below, *John Hamilton*, administrator *cum testamento annexo* of *Jane Wilson*, deceased, of Lancaster township, Lancaster county. *Jane Wilson* was the widow of *John Wilson*, the testator, who died in *October 1799*, and the defendant was his son. By his last will, dated the 31st day of *August*, in the year 1789, after ordering that all his just debts and funeral charges should be paid out of his personal estate, he devised to the defendant the plantation he then lived on, together with all the mountain and timber land lying in *Chester* county, in fee simple. He then bequeathed to his daughter, *Mary Peters*, £400, to be paid in one year after his decease, with deduction of what she had already received: to his grandson, *John Hamilton*, £100, when he arrived at 15: to his grandson, *John Peters*, £100, when he arrived at 18: to *Samuel Bigart*, who married his daughter *Nancy*, 10 shillings, without any deduction: to his two granddaughters, *Sarah* and *Margaret Bigart*, £50 each, when they came to 18: “*Item*, I further will and allow my well beloved wife, *Jane Wilson*, to have the profits of the place I now live on, which is in *Leacock* township, during her natural life, and at her decease to fall into the hands of my son, *John Wilson*. *Item*. It is my will, that the land where *Robert Knox* now lives on, in *Leacock* township, together with 50 acres of timber land lying in *Lampeter* township, be sold after my decease, and £100 of the purchase money be paid to my daughter *Margaret Hamilton*, and the interest of £100 be paid to my

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daughter, *Mary Peters*, and at her death, the said £ 100 to be divided equally among her children." He then appointed his son, the defendant, and his son in law, *Robert Hamilton*, his executors, and revoked all former wills. *Robert Hamilton* renounced: the defendant afterwards filed an inventory of the personal estate of the testator, consisting of cash, bonds, notes, and book accounts, amounting to the sum of £ 3057 9s. 11d.: and on the 12th *December*, 1801, he settled his account in the register's office, in which he charged himself with the amount of the inventory, and after claiming a credit for the payment of debts, and legacies, and a commission, there was a considerable balance of personal estate due, which was stated by the defendant at the conclusion of the account to be a "balance in the hands of the accountant to be distributed according to the will."

Jane Wilson, on the 26th *January*, 1802, brought an action for money had and received, against the defendant, in the Common Pleas of *Lancaster* county, (afterwards removed to the Circuit Court under the system then existing,) to recover her distributive share, namely, one-third, of so much of the testator's personal estate as remained undisposed of by will, and she recovered £ 621 3s. 3d.^a The present suit was instituted, to recover her portion of the said personal estate, which had been received by the defendant since the 26th *January*, 1802. The defendant pleaded *non assumpsit*, payment, with leave to give the special matters in evidence, a former recovery and set off, and issues were joined. The plaintiff claimed one-third of the amount of a mortgage given to the testator, by *John* and *George Boyd*, on which satisfaction was acknowledged by the defendant, on the 2d *December*, 1803: one-third of the amount paid by *Jesse Gilbert* as a purchaser of the property sold under the will, and paid to the defendant, after the 26th *January*, 1802; one third of a bond given by *John Armstrong* to the testator, and received by the defendant: none of which were included in the above-mentioned inventory: one-third part of several other bonds which were included in the said inventory: and one-third part of certain other bonds of *Jacob Swope* and *Jacob Souder*, which it was doubtful, whether or not they were included in the inventory.

On the trial, the inventory and administration account were produced, and it was proved that they were given in evidence on the former trial. It was also proved by the defendant, that *Jane Wilson* brought two writs of dower to *November Term*, 1800, against the tenants in possession, one against *Robert Knox*, to recover her dower out of the lands devised by the testator to be sold, to which the defendant appeared, and pleaded, 1. A devise and bequest in lieu and satisfaction of dower, entered on and accepted by the demandant. 2. A release; on which issues were joined; but the suit

(^a) See this case, *Wilson v. Wilson*, 3 Binn. 557.

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abated by the death of the tenant. The other writ of dower was against *John Scott*, to recover dower out of the land devised to *Jane Wilson* for life.

The following bills of exceptions were taken by the defendant.

First. The plaintiff offered in evidence the depositions of *Jacob Souder* and *Jacob Myer*, and the bonds to which they related: the testimony of *Robert Hamilton*, concerning his bond for £100: on which £75 were paid in *December*, 1808, and £71 19s. 6d. in *February*, 1809: the testimony relative to the bond of *William Evans* and *John Smith*, on which 300 dollars were paid in 1806. The defendant objected, and offered to show the inventory which included the said bonds, and the administration account of the defendant above-mentioned: the institution of the suit in 1802, above stated, in which the inventory and account were given in evidence. But the court overruled the objection, and admitted the evidence, whereupon the defendant tendered a bill of exceptions.

The *second* bill of exceptions was the same as the above, to the bond and receipt of *James Hamilton*.

Third bill of exceptions. After the plaintiff had concluded his case, the defendant offered in evidence, the record of a writ of dower brought by *Jane Wilson* against the defendant to *November* Term, 1800, removed to the Circuit Court, to recover her dower out of her husband's real estate, to show that she had made her election to claim in opposition to the will. This evidence, being objected to by the plaintiff, was rejected by the court, who sealed another bill of exceptions.

Several points were submitted to the court below by the plaintiff and defendant: and the court charged that the plaintiff in this action was entitled to recover any monies received by the defendant, since the institution of the former suit, which the jury were satisfied were not then recovered; that as to the residue of the purchase money of property sold to *Jesse Gilbert*, the writ and count in dower against *Robert Knox*, were evidence to show an election by the widow to take her dower, but were not conclusive: and the writ of dower against *Scott* to recover one-third of the lands devised to the widow for life had no effect to bar her claim in this suit.

Rogers and *Hopkins*, for the plaintiffs in error.

1. It must be taken for granted, that *Jane Wilson* recovered in her former action, her share of all the debts included in the inventory of her husband's estate, and she therefore cannot now recover any part of those debts. The former suit was for the recovery of *all* to which she was entitled from the estate. In that suit the inventory was given in evidence by her, in which the executor was charged with these debts. Her demand formed one entire cause of action, not capable of being severed, and as the executor had charged himself with the whole, her right to recover the whole could not be controverted and cannot now be disputed. She might have recovered it then, and cannot have the chance of recovering it

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again. Even a court of equity will not relieve a man who has lost his opportunity at law.

2. The court below erred in rejecting the evidence of a recovery by *Jane Wilson*, against the defendant in an action of dower. This evidence went to show that she had recovered against the will: and yet now she is suing under the will. They cited *Wen: off. Ex. 4, 5. Toller, 275. Rop. Leg. 219. 3 Bac. ab. 27. Godb. 76. Noy, 12. 2 Dall. 268.*

3. The writ of dower against *Knox*, who lived on the land devised by the will to be sold, and counting therein, were a conclusive election by the widow to take her dower. It was an election in a court of justice, and cannot be retracted. It is of record, and therefore differs from elections *in pais*. *Co. Lit. 145. a.* is express that if the wife bring a writ of dower at the common law and count, albeit she recover not, yet she shall never after recover her dower *ex assensu fratris*. So an avowry in a court of record, which is in the nature of an action is a determination of a party's election before any judgment given. *Ib. 145, 6.* On the same ground an action by a widow for an annuity devised to her by her husband, and recovery, are a bar to her action of dower. *10 Johns. 30.* And on the other hand a recovery in dower is a bar to a testamentary provision in lieu of dower. *Cro. Eliz. 128.* It is a principle that one shall not claim under a will without giving full effect to it, in every respect, so far as such person is concerned. One who opposes it in part must reject it in the whole. He cannot take a part and reject in part. *2 Rop. on Leg. 212. Cas. Temp. Talb. 182. 2 Atk. 44. Pow. on Devises, 469.* And when an election is made by the party, it is binding on his representatives. *1 Mass. Rep. 211. 3 Har. & M'Hen. 95.* The suit by the widow against *Knox* to recover dower in the lands directed by the will to be sold, was in direct opposition to the will: and though it did not prevent the sale was calculated to injure it.

Buchanan, contra.

1. In an action for money had and received, the plaintiff can only recover the amount of the money actually received by the defendant. *Ralston v. Bell, 3 Dall. 242.* In conformity with this principle, the plaintiff was precluded in the former suit, as appears by the notes of Judge SMITH, who tried the cause, from recovering any money which had not been actually received by the defendant. The inventory and administration account, given in evidence in that suit, were not conclusive on the defendant: he was at liberty to show, and did show, on the trial, that he had not received all the debts with which he had charged himself. *Lautermilch v. Kneagy, 3 Serg. & Rawle, 202, and Kohr v. Fedderhaff, 4 Serg. & Rawle, 248,* are authorities to show, that a settlement in the Orphans' Court is not conclusive. As the defendant first prevailed against the plaintiff on the ground that a settlement in the Orphans' Court was not conclusive, it would be strange if he could succeed now on the ground that it was conclusive.

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2. The error alleged on this point proceeds on taking it for granted, that the suit by the widow against *John Wilson* for dower in the lands devised to her for life was in opposition to the will. But this court has decided, that the writ of dower against *John Wilson* was not evidence, because it was not in contradiction to the will. The widow is not put to her election to take under the will of her husband, or her dower, except by express declaration, or necessary inference from the inconsistency of her claim with the dispositions of the will. *Webb v. Evans*, 1 *Binn.* 572.

3. This is the great point in this cause. Did the writ of dower brought by *Jane Wilson* against *Knox*, prove an irrevocable election to take her dower in that land, and not her share of the money for which it should be sold? I grant it was evidence of election; but unless it was conclusive evidence, the court below was right in their charge. It was a mixed question composed of law and fact, which the court was not bound to decide but left purposely to the jury. It might have been done under a misapprehension of her rights: and in such case chancery would relieve her; for there must be a knowledge of a party's right, to make a binding election. 3 *Johns. Ch.* 422. The writ of dower was sued out before the sale made by the executors: if it had been brought after that sale, the case would have been very different. But no harm was done: she did not interfere with the sale nor molest the purchaser. She might even have recovered her dower, and yet afterwards given up her claim to enable the executors to sell. She had no means of compelling them to sell. She was entitled to one-third of the money arising from the sale absolutely, inasmuch as the will converted the land into personalty. How can it be supposed that she would elect to take a life estate in one-third in preference to the absolute property? In truth, she never could have recovered in the action of dower: because *Knox* was a tenant for years, and dower lies only remedy against the tenant of the freehold. 2 *Saund.* 43, note 1.

In reply, it was stated, that there was no weight in the argument that *Knox* was only a tenant for years, because he did not plead in abatement that he was not tenant of the freehold, but in bar of the action, namely, that the testator had devised to the demandant other land in lieu of dower.

The opinion of the court was delivered by

DUNCAN, J. That the executor, in this state, has always been considered as a trustee of the next of kin, as to all the residue of personal property undisposed of by the testator, was settled between these very parties, and a recovery had by the testatrix in her life time.

To this second action, the defendant below has interposed, first the plea of former recovery; secondly, an election by the plaintiff not to claim under the will, but her dower at the common law, established, as he contends, by two writs of dower; one against *John Wilson*, the other against *Robert Knox*, the tenant of testator,

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living on the tract devised to be sold, and which was sold, and one-third of the purchase money of which she claims in this action, as the residue undisposed of, of the testator's personal estate, as his widow.

The plea of a former recovery is composed partly of law and fact, is a mixed question of law and fact, and the issue is always to the country.

This was an action for money had and received to and for the use of *Jane Wilson*, against the defendant as her trustee. It is on the principle of trust alone, that the action can be maintained. It is in the nature of a bill in equity. The declaration states no specific, single cause of action, money received from a particular person for the use of the plaintiff; and in this form of action, a plaintiff can only recover the money which the defendant has actually received. It was, therefore, competent to the plaintiff to show what money she really did recover, and on what account; and to show, that she did not and could not recover certain sums of money which she sought to recover in this action, because it was not one entire transaction or cause of action, incapable of separation, and which the plaintiff could not split up into several actions, but separate and distinct causes in their nature; and even in the case of an entire contract, where action cannot be brought till all the days of payment are past; yet where the action sounds in damages, as in the present case, and not debt, the plaintiff may sue in order to recover damages for every default made in payment. *Ashford v. Hall, Andrews*, 370. So, if money is awarded to be paid at different times, assumpsit will lie on the award for each sum as it becomes due. *Cooke v. Whorwood*, 2 *Saund.* 338. It is unreasonable that an action can be brought for money not due, and ungracious to object, that because you have recovered money which was really due at the time you sued and recovered, that you shall not recover money from me which I did not then owe, because I had not received it, but which I have since received as your trustee. To permit a plaintiff to prosecute in a second action, what was included in and might have been recovered in the first action, would be unjust and against the policy of the law, because it would harass a defendant and expose him to double costs. This is the doctrine in *Hesse, Executor of Hesse, v. Heeble*, 6 *Serg. & Rawle*, 57. If he does not bring it forward on the first trial, he is supposed to have abandoned it, and has no cause of complaint. But where he does not specifically include it in his first action, and could not recover it if he did, that he should be barred from ever recovering it, would be most aggravated injustice.

The former recovery was only *prima facie* evidence that demands were inquired into, but not conclusive. The issue in the plea is, whether the damages demanded in this action were recovered in the former one, and the plaintiff ought clearly to show, that this same cause of action had not been litigated and decided

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in that action. The evidence was competent to show that it had not been recovered in that action, because the defendants showed it had not been actually received by the executors.

There was, therefore, no error either in the admission of this evidence, or in the instruction given to the jury on the plea of former recovery. It was for the jury to decide whether it was recovered or not.

On the ground of election, the case presents one question of some difficulty. If this is undisposed of residue of the personal estate, the question of election, strictly, cannot well arise; for the defendant claims as if the testator *quoad* this residue, had died intestate. She does not claim this under the will, or ask it in opposition to the will, but because there is no will disposing of it. But it has some resemblance to election, so far as respects the land sold to *Jesse Gilbert*, which she claims as personal estate. Now she shall not be allowed for her benefit to consider it as both real and personal estate, and to claim distinct interests in two qualities. There is nothing equitable in this. Her claim of it as personal estate is equity: at law, the executors take the surplus. But it is held, that in *Pennsylvania*, though the executor takes it, he takes it as a trustee for the next of kin, and she can only claim it passing to him as personal estate. Her claim of it as land, is equivalent to a declaration that she will abide by her legal right. She disowns the trust, and in such case the writ of dower and count in dower are a conclusive election made by her, of the state in which she considers this property and claims it.

It is a different question from taking in opposition to a will. She has two interests arising out of the same subject, the land. She may use it either way, but not both ways; and to one entire act. Here she had two ways arising out of her interest. She cannot work it both ways. *Hob.* 159, 160. This action of dower was a disclaimer in a Court of Record (*Butler and Baker's Case*, 3 Co. 26. b.) of all claim to this as personal estate. An election is made by real action in a Court of Record, claiming as realty. She asserts her legal right to this as real property; by a real action. She, therefore, by necessary consequence, disclaims all equitable right to it, as personal estate, by a personal, equitable action, as this is.

In the *Appeal of John Anderson, Administrator of Christopher Griffith*, 4 Yeates, 35, heir at law claiming an interest in intestate's estate as personal in the Orphan's Court, was estopped from asserting his right to the land. One of the reasons why estoppels are allowed, is, that what a man hath once asserted in a court of justice is presumed true, and he ought not to be permitted to contradict it.

But there is another view of this subject, quite satisfactory to my mind, which has not been adverted to; and that is, that there is no resulting trust to the next of kin of the testator, of the surplus of the proceeds of the sale of land, after satisfying the specific

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purposes, but the trust is for the heirs. "It is my will, that the land whereon *Robert Knox* lives, in *Leacock* township, together with fifty acres of land lying in *Lampeter* township, be sold after my decease, and £100 of the purchase money to be paid to my daughter, *Margaret Hamilton*, and the interest of £100 to be paid to my daughter *Mary*; and at her decease, the said £100 to be divided equally among her children." The heir takes the resulting trust of the residue, after satisfying the charges. A difficulty sometimes arose, in what quality he took, whether real or personal estate. When the object of the sale has ceased, and no further disposition is to be made, the heir takes a resulting trust. 6 *Johns.* 81. The appointment of an executor vests the whole personal property in the executor. The legal title is in him: he is as much proprietor as the testator was in his life time. Not so of lands; for what is not devised, vests in the heir: the executor has neither interest nor power, but what is specifically given to him: for every devise of land is, from necessity, specific. There must be a substantive and independent intention to turn the real estate, at all events, into personal; not where there is only a specific purpose, and no conversion except to answer that purpose. The heir takes all that which is not for a defined and specific purpose, given by the will. There is no doubt but that the heir, paying the charges on the land, could prevent a sale; and there is no spark of equity between the heir and next of kin. There cannot be a gift without a donee. Plain words of gift are necessary to disinherit an heir at law.

A devise of real estate to be sold, the object being a provision for legacies, and not an absolute conversion to all intents, the heir at law takes the surplus, which would not be affected by the appointment of a residuary executor. Here it is not converted out and out, nor the surplus directed to be disposed of; but is a surplus fund resulting to some one; and I do not see how the personal representative can ever get at that, which was not personal at the death of the testator, but by express direction; and there being no such direction, the heir at law is entitled to it as a resulting fund, because it was real estate—land—at the deviser's death, and this part of it an interest in the real estate—land—not effectually devised; and which, therefore goes to the heir. It is for this reason, that the produce of an estate, which the deviser directs to be sold, can never be, strictly, part of his general, personal property. Every person taking an interest in the produce of land directed to be sold, is in truth a devisee, and not a legatee. But here is neither legatee nor devisee, nor any disposition of the surplus as money. Whatever interest in a profit out of real estate is undisposed of descends to the heir. *Talbot's Cases*, 43.

Where there is a devise to trustees to sell to pay debts, &c. and no disposition is made of the residue, the benefit of the residue descends to the heir at law; because the devise is taken to be simply

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a charge, and the estate so far remains real notwithstanding. But in case of personal estate, the law vests the legal title in the executor, of all undisposed of, as it does of all the real estate in the heir undisposed of by the will.

It is not necessary there should be an expression in favour of the heir to enable him to take; but it is necessary there should be a clear expression or manifest implication, that the testator intended to give it to some one else, to take it from the heir. And if it is doubtful what the intention was, or if there were no intention about it, the heir must take. If it was a measuring cast between the heir and next of kin, the heir must take.

Whenever the executor takes a residue of personal estate, and is made a trustee for the next of kin, the trust is equally for the widow; because then it goes under the intestate law, as part of the personal estate undisposed of. But the produce of land undisposed of, goes as the land itself would. But under a bequest of the residue of personal estate to the next of kin, without more, the widow does not take. If this widow takes this as a personal estate, she does not take it because of the intestacy of her husband, but must take it because it was given to her by the will. She cannot take it as if her husband had died intestate, because, in that event, she is entitled to dower alone. She cannot take it under the will, because it is not given to her. The claim of the widow, if supported, would defeat the intention of the testator, and it is difficult to maintain the construction, that this estate was converted, out and out, by the testator, into personal estate, and was such at his death; and impossible to support the position, that he devised her one-third of the surplus of this land in fee simple, after discharge of legacies. For that would be the consequence; and if no sale had been made, she then could have maintained an ejectment for one-third of the land: than which nothing could be more contrary to every principle both of equity and law, or more repugnant to the intention of the testator.

The court are of opinion, that the surplus money arising from the sale of the land, after payment of the legacies charged specially thereon, went as a resulting fund to the heir; and would not go, either to the executor or next of kin, as an undisposed of residue of personal estate, and that the plaintiff would not be entitled. And that if it were undisposed residue of personal estate, having made her election by action in a Court of Record to claim it as real, was a disclaimer of any equitable interest in it as personal estate. The widow having annulled the will as respected this tract, by judicial process, her election by this repudiation was made, to take this as real estate. She reprobated all claim to it as personal; denied its conversion into personal. When she, in a Court of Record, prosecuted her right to this as real, she elected to reprobate the will, in order to establish her claim to this as real. She could not, afterwards, approbate it, so as again to make it personal.

(Wilson, Executor of Wilson, v. Hamilton, Administrator of Wilson.)

The record in the action of dower against *John Wilson*, was properly rejected. It was immaterial; for whether she recovered dower, or sued for it, from the land devised to *John* or not, could have no operation on the claim she set up in the action for the produce of the sale of the lands directed by the executor to be sold; nor on the undisposed residue of that which was purely personal estate at the testator's death, to which she has an unquestioned right.

Judgment reversed, and *venire facias de novo* awarded.

[LANCASTER, MAY 19, 1823.]

STOEVER *against* STOEVER for the use of his Creditors.

IN ERROR. 29 P.F.S. 84

A devise of a lot with the houses upon it to A. as his own property, and of certain specific legacies of which he was not to be master till his full age, and in case he died before lawful age, or after such age, without issue, then all and singular the above legacies, or what shall be left thereof, to be sold and divided among other children, carries a fee simple in the lot and house.

A deed accompanied with a written agreement between the parties of the same date, reciting that the deed was made for a certain sum due from the grantor to the grantee, or for securing the payment thereof, and stipulating that the grantee will not sell or mortgage the property for three years and three months, and will then deliver up the deed to the grantor if the money is repaid by instalments within that time, and providing that if either party die, or the premises must be sold within that time, and more than the sum due, and interest are obtained, the surplus shall go to the grantor, but if less, the grantor shall supply the deficiency—is a mortgage

If, however, the money is equal to the value of the premises, and the time fixed elapses without payment, and the grantee brings ejectment, on which a judgment is entered by agreement, stipulating, that in case of repayment by a certain day, the property shall remain in the defendant, otherwise a writ of *habere facias possessionem* to issue, and the rents of the interval to be paid to the plaintiff, and default of payment being made a writ issue, on which possession is delivered to the grantee, who retains it and makes improvements, the grantor acquiescing by silence, and becoming insolvent and making no return of the premises as his property, the grantee is entitled to the premises.

But parol evidence is admissible on behalf of the plaintiff suing for the use of his creditors, to show a prolongation of the time of redemption, and to rebut the presumption of acquiescence, by the declarations of the grantee, that he intended after a sale to pay the surplus to the creditors or children of the grantor.

Laying a consideration executed in assumpsit, without previous request, is bad on demurrer, but is cured by verdict.

An insolvent debtor, who has assigned his property, cannot sue for a cause of action existing at the time of the assignment, in his own name, though empowered by his creditors, and though the assignees have not acted.

On a mortgage of land, with authority to the mortgagee to sell after a certain time, and to pay the surplus, if any, after satisfying the debt, to the mortgagor, if there is no covenant or special agreement to pay, *indebitatus assumpsit* lies for money had and received, for a surplus arising from sale.

A trustee of an insolvent debtor, who releases all his claims as creditor to the insolvent, is a good witness on his behalf in a suit in the insolvent's name, for the use of his creditors.

If the question whether mortgage or not depends solely on writings, parol evidence is inadmissible, but if it be admitted, and the question depends partly on that evidence, it should be left to the jury whether it was a mortgage or not.

ERROR to the Court of Common Pleas of *Lebanon* county.

Assumpsit by the plaintiff below, *Frederick Stoever*, as well for himself as his creditors, against *Tobias Stoever*, the defendant below. The declaration stated in the first count, that on the 1st *January*, 1818, in consideration that the plaintiff and his wife had, before that time, sold and conveyed to the said *Tobias* in fee simple, a certain lot of ground, with the buildings thereon situate, in the Borough of *Lebanon*, the defendant then and there undertook

(Stoever v. Stoever for the use of his creditors.)

and faithfully promised to pay the plaintiff whatsoever sum of money the defendant should sell the said lot of ground, with the appurtenances, for, over and above the sum of £1,800; averring, that afterwards, viz: on the day and year aforesaid, the defendant sold the said lot of ground, with the appurtenances, for the sum of £6000; yet, &c. The second count was for £4,200, money had and received: concluding to the damage of the said *Frederick* and his creditors, £5000. The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*, and issues were joined.

On the trial, the case appeared to be as follows:

On the 23d of *February*, 1801, articles of agreement under seal, were executed by *Frederick Stoever*, of the one part, and *Tobias Stoever* of the other part, reciting, that "whereas the said *Frederick Stoever* now oweth the said *Tobias Stoever* the sum of £1,800, of gold or silver money of *Pennsylvania*, for which sum of money, (or for the securing the payment thereof,) the said *Frederick Stoever*, and *Margaret*, his wife, by an indenture of conveyance, bearing equal date herewith, did grant and convey unto the said *Tobias Stoever*, his heirs and assigns forever, a certain lot of ground, number 68, situate near the centre of the said Borough, bounded by *Cumberland Street*, *Market Street*, and an Alley on the east, together with a large three story brick messuage, or dwelling house, and also a two story log house, both on the said lot of ground erected, together with the appurtenances; Now this agreement witnesseth, that the said parties have, and by these presents do, mutually agree to, and with each other, as follows, to wit: the said *Tobias Stoever*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree to, and with, the said *Frederick Stoever*, his heirs, executors and administrators, that neither he the said *Tobias Stoever*, nor his executors, or administrators shall, nor will, any, or either of them, sell, convey, or mortgage the aforesaid lot of ground, nor any of the messuages thereon erected, unto any person or persons whomsoever, for the space or term of three years and three months, from the date hereof; and further, that the said *Tobias Stoever*, his executors, or administrators, shall and will give up, and redeliver the aforesaid deed, or indenture of conveyance, at any time within the said term, or space of three years and three months, if the said debt or sum of money is paid in the manner hereinafter mentioned, that is to say, if the said *Frederick Stoever*, his executors, or administrators, shall, and do, well and truly pay, or cause to be paid, unto the said *Tobias Stoever*, his executors, or administrators, the sum of £1000, part of the debt aforesaid, on the first day of *May*, which will come and be in the year of our Lord 1803, with lawful interest for the same yearly; and the further sum, or residue and remainder of the said debt, to wit, £800 money aforesaid, on the first day of *May*, which will come, and be, in the year of our Lord 1804, with lawful interest for the same yearly. And in case that either the said

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Frederick Stoever, or *Tobias Stoever*, may happen to die within the said term of three years and three months from the date hereof, and in case it might happen, that the whole premises must be sold within the term aforesaid, that then the whole premises shall be sold at public vendue, and if the price or consideration money amounts to more than £1800, all such overplus shall be paid to the said *Frederick Stoever*, his heirs, executors, or administrators, (the interest aforesaid to be reckoned to the said £1800,) and if the price or consideration money aforesaid shall happen to be less than £1800, and the interest aforesaid, then the heirs, executors, or administrators of the said *Frederick Stoever*, shall supply, make good, make up, and pay such deficiency or sum wanting, unto the said *Tobias Stoever*, his heirs, executors, or administrators, according to the true intent and meaning of these presents. And further, for the true and faithful performance of all and singular, the covenants and agreements aforesaid, each of the said parties bindeth himself, his heirs, executors, and administrators, unto the other, his heirs, executors, or administrators, in the penal sum of £3,600, lawful money of *Pennsylvania*, to be paid by the party failing in the performance thereof. *In witness, &c.*

F. Stoever and wife, on the same day, executed a deed, conveying the above described property to the defendant, in fee simple, in consideration of the sum of £1,800, and acknowledged it on the 14th *December*, 1802. It was recorded on the 14th *May*, 1803. An ejectment was brought by the defendant, *T. Stoever*, against the plaintiff in the Circuit Court for *Dauphin* county to *December* term, 1805, and served on *F. Stoever* and others, who appeared, and pleaded not guilty, and entered into the common rule, and the cause was marked for trial. Judgment was entered on the 16th *April*, 1807, under the following agreement of the parties, filed of record in the court. "It is agreed by the parties in this cause, that a judgment be entered, and that no writ of possession issue until the 1st *April* next. And in case the amount of the debt due to the plaintiff is repaid, with interests and costs of suit, on or before the said day, the property to remain in the defendant: but if the debt, interest, and costs of suit, are not then paid, a writ of *habere facias possessionem*, to issue immediately, and the rents of the present year to be paid to the plaintiff, in case of non-payment." A writ of *habere facias possessionem* was issued on this judgment, returnable to *July* term, 1808, with a *fi. fa.* for the costs, and possession was delivered under it to the defendant.

On the 1st *January*, 1809, *Frederick Stoever*, the plaintiff, petitioned the Court of Common Pleas of *Dauphin* county, (in which *Lebanon* was then embraced,) for the benefit of the insolvent laws, and was discharged on the 6th *March* following, having on that day assigned all his property under the insolvent laws, to *Michael Steckbeck*, *Leonard Immel*, and *Anthony Kelker*, in trust for the benefit of his creditors. No notice was taken in the list of property

(Stoever v. Stoever for the use of his creditors.)

attached to the petition of any claim by the petitioner to the lot of ground.

The defendant offered the property for sale upon the following conditions, published on the 30th *October*, 1813: one half the purchase money to be paid on the 1st *April*, 1814, and the residue for the brick house and lot in three equal annual payments, to be made 1st *April*, 1815, 1816, and 1817: and for the lot and log-house thereon, the residue in two annual payments, to be made on the 1st *April*, 1815 and 1816. A notice was published in the newspaper on the same 30th *October*, signed *F. Stoever*, that those persons who might be induced to purchase the two large houses for sale that day, would do well to search the office at *Lancaster*, and examine the title, that they might not be belied and cheated. *Peter Lineweaver* became the purchaser, at the price of £5050, and on the 1st *April*, 1814, received a deed from the defendant, with a clause of general warranty: but at the same time, obtained a bond of indemnity from the defendant, in the sum of 2000 dollars, conditioned for securing the title against all persons whatever.

Evidence was given on the part of the defendant to show that the value of the property in the year 1801, was about £2000, and that prior to the sale to *Lineweaver*, the defendant had expended about 6 or 700 dollars, in repairing the premises.

In support of the plaintiff's claim, evidence was given by *Michael Steckbeck*, that in the year 1809, the defendant came to the witness's house, and in a conversation with him, told him that if the assignees of *Frederick Stoever* would do nothing in the assignment, when he sold the houses, he would give the overplus of what *Frederick* owed him to *Frederick's* children, or to the assignees. He afterwards declared to the witness, in the same conversation, that if he sold the house, he would not have a cent more than his debt; and that it was always his intention never to retain a cent more, and to give the surplus to *F. Stoever's* children, or his creditors. And again said, that as true as God's in Heaven, and he was sitting on his horse, he would not keep a cent more than his own money: and that when the witness heard that he had sold the houses, he must come to him, and he would pay the money for the creditors. In 1818, the witness called on him, but he declined paying. Several other witnesses spoke to conversations in 1808, 1811, 1815, 1816 or 1817, and 1820. In 1811, the defendant said, that let the houses sell for what they would, he would only take his own money: that he would pay the overplus remaining after his debt was paid, to *F. Stoever*, or his creditors: that his debt was £2,400, or £2,500, and he claimed no more than this out of the property. In 1813 or 1814, he declared that he held these houses as security for this sum, and that if the debt was paid, *Frederick* would have the houses again: in 1815, 1816, or 1817, that he had got about 15 or £1600 for the houses, which was coming to *Fre-*

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derick yet: and in 1820, that he owed *Frederick* the money, but would not give it up to him.

The assignees never acted under the assignment, and on the 27th December, 1817, after the death of *Anthony Kelker*, one of the assignees, the following agreement was made between the surviving assignees, and some of the creditors of *F. Stoever*, and executed respectively by the parties.

Articles of agreement, made and concluded between *Michael Steckbeck*, *Leonard Immel*, *George Zinn*, *Adam Stoever*, *George Stoever*, *Peter Ruhl*, *Michael Leshner*, *John Richard*, *John Carrel*, and *Mary Robison*, the creditors of *Frederick Stoever*, Esq. of the Borough of *Lebanon*, &c., an insolvent debtor, of the one part, and the said *Frederick Stoever*, Esq. of the other part, *Witnesseth*, that whereas, at the time that the said *F. S.* was discharged under the insolvent laws of *Pennsylvania*, he assigned all his property to *Michael Steckbeck*, *Leonard Immel*, and *Anthony Kelker*, in trust for themselves and the other creditors of the said *F. S.*; and whereas, the assignees have hitherto neglected to take on themselves the trust aforesaid, we, therefore, the said creditors, in order to have the affairs of the said *Frederick Stoever*, brought to a final settlement, do hereby release all our right of, in, and to, all and singular, the real, personal, and mixed estate, of which the said *Frederick Stoever* was in any manner, or any way, entitled, which passed to his said creditors under the said assignment: and we do hereby empower the said *Frederick Stoever* to sue for, and recover the same, in his own name, or otherwise, as fully and freely as he might have done, in case the aforesaid assignment had not been made, or if he had never taken the benefit of the insolvent laws, nevertheless, in trust for our use; and the residue of the said property, after the principal of the said debts being paid to us without interest, to appropriate to his own use. And further, to do all things which the said *Frederick Stoever* may deem best calculated to promote the interest of all the parties. *In witness, &c.*

It further appeared by evidence given on the part of the defendant, that *Frederick Stoever* had derived this property from his father, who devised it to him in the year 1779, in the following terms: "I further give and bequeath unto my youngest son, *Frederick*, the corner lot, with the houses upon it, in *Lebanon*, with the benefit of two eighth parts of the ground rents belonging to *Lebanon*, as his own property. The organ, a horse, saddle, his bedding, table, chairs, silver spoons, gilded cups, desk, looking glass, bedstead, all the money now in possession, both congress and hard money, of which numbered particulars he shall not be master of till he has attained his full age, which will be in *September*, 1780. Appendix to the will. Further, I will and order, that in case my son *Frederick* should die before he has his lawful age, or should die after he has come to his lawful age, without issue, then, all and

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singular the above legacies, or what shall be left thereof shall be sold, and then it shall be equally divided among the rest of my children, or their representatives." *Frederick Stoever*, at the time of trial, was of full age, married, and had lawful issue.

Thirteen bills of exceptions were taken in the course of the trial, on behalf of the defendant, to evidence offered on the part of the plaintiff, and admitted by the court.

The *first* was to the admission of the deed from *Tobias Stoever* to *Peter Lineweaver*, dated the 1st *April*, 1814.

The *second* was to the admission of *Michael Steckbeck* as a witness, after the production of a release from him to *Frederick Stoever*, dated the 8th *December*, 1818. He was objected to as being a trustee of the estate of *F. Stoever*, appointed by the court on his discharge under the insolvent laws, on the 6th *March*, 1809.

Immediately after *Steckbeck's* admission, the defendant called a witness, who stated, that in *August*, 1819, *Steckbeck* told him that he had given up to *F. Stoever* his bond, but *F. Stoever* owed him 2 or 300 pounds yet. The plaintiff then executed a release to *F. Stoever* in court, and the witness who proved its execution, stated, that no money was paid at its execution, nor was any consideration given that he knew of: it was intended to embrace the object of the former release. The defendant then again objected to his admission, but the court overruled the objection, and sealed a third bill of exceptions.

Steckbeck was then examined by the defendant, as to the power of attorney given by him and others, dated the 26th *December*, 1817, (above recited,) and on the production of this paper, the defendant again objected to the competency of the witness. But the court overruled the objection, and a *fourth* bill of exceptions was tendered.

The witness, *Steckbeck*, then proceeded to detail conversations with the defendant of the tenor above-mentioned, when the defendant objected to any statement by the witness of what took place more than six years before this suit was brought: but the court overruled this objection, and sealed a *fifth* bill of exceptions.

After *Steckbeck* had gone through his examination in chief, the plaintiff asked him whether he had been paid his debt in full by *Frederick Stoever*, and whether he had any interest in this cause? To these questions the defendant objected, but the court allowed them, and a *sixth* bill of exceptions was taken.

On the conclusion of *Steckbeck's* cross examination, the defendant tendered a *seventh* bill of exceptions to the whole of his evidence.

The remaining bills of exceptions, were on points not noticed in the opinion of the court, and therefore, not material.

The following points were submitted to the court by the defendant.

1. That every action founded upon a contract, must be brought

(Stoevers v. Stoevers for the use of his creditors.)

in the name of the party in whom the *legal* interest in such contract is vested; and that by the insolvency of the plaintiff, and his assignment of the 6th *March*, 1809, of all his estate, the legal interest in the contract upon which this suit is founded, is vested in his assignees, and any suit at law, brought to enforce the performance of it, must be in their names, and not in that of the insolvent debtor.

2. That by the assignment of the 6th *March*, 1809, the estate of the plaintiff vested in his assignees, and cannot be divested by any composition of the plaintiff with a part of his creditors; and that by the evidence in the cause, nothing more than a partial composition with the creditors has been shown, which cannot divest the legal right of the assignees.

3. That if he can sue in his own right, the form of action is misconceived; for if there be any cause of action, covenant, and not case is the proper remedy; the contract being under seal, precise in its terms, and affording a specific action.

4. That the parol testimony adduced in the cause proves no contract made by the plaintiff with the defendant, on which this action can be supported.

5. That the contract evidenced by the deeds and articles in the cause, is a conditional sale of the property, which, not being repurchased within the time limited, became absolute, and all the testimony given in the cause does not vary that character.

6. That as the articles of agreement of the 23d of *February*, 1801, are the parties own exposition of their meaning, as to the absolute deed between them of the same date; the terms of that agreement cannot be enlarged, restricted, or in any wise varied by parol testimony, but their construction must be made on the two instruments, when there is no evidence or testimony at the time of their execution, of fraud or mistake.

7. That if the court shall be of opinion, that the original bargain is to be considered as a mortgage, then it was released and abandoned by the subsequent conduct, actions, and admissions of the parties.

8. That by the recovery in ejectment given in evidence in this cause, going into full and complete operation and effect, under the agreement of the parties in that cause given in evidence in this: the fee simple, conveyed by the deed of the 23d *February*, 1801, became absolute, and the restrictions contained in the articles of the same date annulled, leaving the terms upon which the judgment was rendered, the only stipulations between the parties.

9. That if the deed of the 23d *February*, 1801, became absolute, as stated in the preceding proposition, No. 8, no consideration could afterwards arise out of it to support any subsequent promise, and that if any such promise were supposed to be proven in the cause, the same would be void for want of consideration. And that if it did not so become absolute, yet being evidenced by spe-

(*Stoever v. Stoever* for the use of his creditors.)

cialty, it could not become the consideration of a parol promise in this case.

10. That as the plaintiff, by his advertisement of the 30th *October*, 1813, published upon the day of sale, stigmatized the title which the defendant on that day was selling, under his deed of 23d *February*, 1801, which obliged the defendant to give a bond of indemnity for 2000 dollars to the purchaser, the plaintiff, even if the original transaction were a mortgage, and could be considered so to continue, could not claim any of the proceeds of the sale, while the responsibility created by that bond continued.

11. That as the title derived to *Frederick Stoever*, under his father's will, and that granted by him to *Tobias Stoever*, is defective and uncertain, as to the interest devised to the devisee, the said *Frederick*, and as he has never removed these defects, he cannot recover in this suit.

The opinion of the court in *answer to the foregoing points*.

1. Every action founded upon a contract, must be brought in the name of the party in whom the legal interest in such contract is vested. By the assignment of *F. Stoever* of the 6th *March*, 1809, the legal interest in the contract upon which this suit is founded, vested in the assignees, *Anthony Kelker*, *Michael Steckbeck*, and *Leonard Immel*. *Anthony Kelker* died without having done any act as assignee, and *Michael Steckbeck* and *Leonard Immel*, the surviving assignees, on the 27th *December*, 1817, join with some other creditors, in executing an instrument of writing to *Frederick Stoever*, which recites the discharge of *Frederick Stoever* under the insolvent laws of *Pennsylvania*, and his assignment to *Michael Steckbeck*, *Leonard Immel*, and *Anthony Kelker*.

By this instrument *Frederick Stoever* has authority for bringing suit vested in him, and the present action, brought in the name of *Frederick Stoever*, for the use of his creditors, is properly brought.

2. By the paper of the 27th *December*, 1817, recited in answer to No. 1, *Frederick* has authority to sue, and this suit is properly brought.

3. The form of action is not misconceived.

4. This is a question of fact for the jury to decide. Several witnesses have sworn that the defendant repeatedly declared, that he wanted no more than his own debt out of the proceeds of sale of the houses and lot, and that he would give the surplus to *Frederick Stoever*, his creditors, or his children. If these witnesses have sworn the truth, then most certainly, they show a contract on which this action can be supported.

5. The contract evidenced by the deed and articles is a mortgage, and the nonpayment of the debt within the time limited, does not alter its nature, and make it an absolute sale. An estate cannot be a mortgage at one time, and an absolute purchase at another.

6. As the articles of agreement of the 23d *February*, 1801, are

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the parties own exposition of their meaning as to the deed between them of the same date—the terms of that agreement cannot be enlarged, restricted, or in any manner varied by parol testimony, but the construction must be made on the two instruments when there is no evidence or testimony at the time of their formation and execution, of fraud or mistake.

7. The original bargain is to be considered as a mortgage, and the subsequent conduct, actions, and admissions of the parties proved in the cause, do not show that it was released and abandoned.

8. The recovery in ejectment going into effect under the agreement of the parties in that cause, amounts to nothing more than a recovery by a mortgagee. The fee simple conveyed by the deed of 23d February, 1801, did not become absolute—and the restrictions contained in the articles of same date, were not annulled. They still remained.

9. If the deed of the 23d February, 1801, had become absolute, as stated in the preceding proposition, No. 8, then certainly no consideration could afterwards arise out of it to support any subsequent promise, and if such promise were supposed to be proven in the cause, the same would be void for want of consideration. But as it did not so become absolute, although evidenced by specialty, it could become the consideration of a parol promise in this case.

10. Admitting the facts stated in this proposition, the plaintiff can claim part of the proceeds of sale, notwithstanding the continuance of the responsibility created by this bond.

11. The title derived to *Frederick Stoever* under his father's will, and that granted by him to *Tobias Stoever*, is neither defective nor uncertain as to the interest devised to the devisee, the said *Frederick*. It is in evidence that he is of full age, is married, and has issue. There being no defects in the title, he can remove none, and may recover in this suit.

Points submitted by the plaintiff.

1. The same as No. 5, submitted by the defendant, and the opinion of the court the same, that the contract was a mortgage.

2. That by the contract of the 23d February, 1801, *Tobias Stoever* became a trustee for the use of himself and *F. Stoever*, and was invested with power to sell the premises, and was liable to account for the proceeds of the sale. The court answer this point in the affirmative.

3. That the assignment of *Frederick Stoever* to his creditors when he was discharged under the insolvent laws, vested the contingent interest of *Frederick Stoever* in the said premises in his said trustees, with power to convey the same to whomsoever they pleased. The court say this is the law.

4. That a recovery by the mortgagee against the mortgagor in ejectment, is not a foreclosure of the equity of redemption, but that although the mortgagee may in ejectment, recover the mortgaged

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premises after default made in the condition, yet the mortgagor may, at any time within 20 years after the forfeiture, recover the premises, by repaying or tendering the whole amount of the debt, interest, costs and charges, to which the mortgagee may have been subjected. Affirmed by the court as the law.

5. *Tobias* having taken the conveyance from *Frederick*, and at the same time, executed to him the agreement, having recovered possession of the premises in ejectment, and afterwards sold the premises at public sale, he is bound in law to account for the proceeds of the sale, retaining his debt, interest, and reasonable expenses and repairs. The court say this is the law.

The case was argued by *Norris* and *Hopkins*, for the plaintiff in error, and *Wright* and *Fisher*, for the defendant in error.

The opinion of the court was delivered by

DUNCAN, J. This was an action of assumpsit, brought by the defendant in error against the plaintiff in error. There are two counts in the declaration, and a general verdict in favour of the plaintiff. The first states, that whereas, heretofore, on the 1st *January*, 1818, in consideration that the said *Frederick* and *Margaret* his wife had, before that time, sold and conveyed to the said *Tobias* in fee simple, a certain lot of ground in the borough of *Lebanon*, he the said *Tobias*, then and there undertook and faithfully promised, to pay the said *Frederick*, whatever sum of money the said *Tobias* should sell the said lot of ground for, over and above the sum of £ 1800: and the said *Frederick* avers, that afterwards, to wit, on the day and year aforesaid, the said *Tobias* sold the said lot of ground, with the appurtenances, at and for the sum of £ 6000. Yet the said *Tobias* though afterwards requested, hath not paid the said sum of £ 4200, nor any other sum in satisfaction of the same, but the same to pay hath refused, to the damage of the said *Frederick* and his creditors.

The second count is, *indebitatus assumpsit* for £ 4200 of plaintiff, received by the defendant to and for the use of the plaintiff, to his damage and the damage of his creditors, &c.

The state of the case, so far as depends on documentary evidence, is this:

John Casper Stoever, being seized in fee of the lot, on the 12th *May*, 1779, devised as follows: "I give and bequeath to my youngest son *Frederick*, the corner lot, with the houses upon it, in *Lebanon*, with the benefit of two eighth parts of the ground rents belonging to *Lebanon*, as his own property, the organ, a horse, saddle, his bedding, tables, chairs, silver spoons, gilded cup, desk, looking glass, bedstead, all the money now in possession, both congress and hard money, of which numbered particulars he shall not be master, till he has his full age, which will be in *September*, 1780." Appendix to the will. "Further, I will and order, that in case my son *Frederick* should die, before he has his lawful age, or should

(Stoever v. Stoever, for the use of his creditors.)

die after he comes to his lawful age, without issue, then all and singular the above legacies, or what shall be left thereof, shall be sold, and then it shall be equally divided among the rest of my children or their representatives." *Frederick* being indebted to his brother *Tobias*, in the sum of £1800, on the 23d *February*, 1801, with his wife, conveys the lot of ground in absolute fee simple to him; and on the same day *Tobias* executes an agreement tantamount to a deed of defeazance. On the 14th *December*, 1802, the deed from *Frederick* and wife to *Tobias*, was acknowledged by them, and recorded 14th *May*, 1803. *Frederick* continued in possession, and an ejectment was brought by *Tobias* against *Frederick*, to *December*, 1805, and on the 16th *April*, there was judgment on terms in writing filed of record, signed by the counsel of the parties, that a judgment be entered, and that no writ of possession issue until the 1st of *April* next; and in case the amount of the debt due to plaintiff be repaid with interest and costs of suit, on or before the said day, the property to remain in the defendant; but if the debt interest and costs of suit are not then paid, a writ of *habere facias possessionem*, to issue immediately, and the rents of the present year to be paid to the plaintiff, in case of non-payment. This money not having been paid, a *habere facias possessionem*, issued to *July*, 1808, and possession was delivered.

On the 31st *January*, 1809, *Frederick Stoever* petitioned for the benefit of the insolvent laws. There is a list of his property, and of his creditors. This lot of ground is not included, nor any notice in relation to it, of any claim by the petitioner.

On the 6th *March*, 1809, *Frederick Stoever* was discharged, after making the usual assignment of his effects for the benefit of his creditors. His assignees were, *Michael Steckbeck*, *Leonard Immel*, and *Anthony Kelker*.

On the 30th *October*, 1813, the lot, &c. was sold at public sale by *Tobias Stoever* to *Peter Lineweaver*, possession delivered, consideration money £5050. On the same day, notice was given by *Tobias Stoever* in the *Morning Star*, a German newspaper published at *Lebanon*: "Take Notice—who may be inclined to purchase the two large houses for sale this day, will do well to search the office at *Lebanon*, and examine the titles, that they may not be belied and cheated." This notice could relate only to this property, and must have referred to his father's will, and certainly was intended to hold out that the purchaser would be defrauded, and that *Tobias* had no title. To *May*, 1818, *Frederick Stoever* had brought an action of debt on book account against *Tobias*: arbitrators found in favour of defendant, £16 5s. 5½d., and judgment was entered on the report *December*, 1809. On the 1st *April*, 1814, deed with covenant of warranty was executed to the purchaser, *Lineweaver*, and on the 7th *April*, 1814, a bond of indemnity from *Tobias* to *Lineweaver*, in 20,000 dollars, for securing the title against all persons.

(*Stoever v. Stoever*, for the use of his creditors.)

Anthony Kelker, one of the assignees, died, and *Michael Steckbeck* and *Leonard Immel*, on the 27th December, 1817, with four other creditors joined in an instrument of writing to *Frederick*, which after reciting his discharge under the insolvent act, proceeds, "and whereas the said assignees have hitherto neglected to take upon themselves the trust aforesaid, we, the said creditors, in order to have the affairs of the said *Frederick* brought to a final settlement, do hereby release all and singular the real, personal and mixed estate of which the said *Frederick* was in any manner or way entitled, which passed to his said creditors under the said assignment; and we do hereby empower the said *Frederick Stoever* to sue for and recover the same, in his own name or otherwise, as fully and freely as he might have done in case the aforesaid assignment had not been made, or as if he had never taken the benefit of the insolvent laws, nevertheless in trust, and for our use; and the residue of the said property, the principal of the said debts being paid, to use without interest, to appropriate to his own use. And further to do such things that the said *Frederick Stoever* may deem best calculated to promote the interest of all parties to this agreement.

This case will be best understood by separating the written evidence, all of which was clearly competent, from the parol evidence which has been excepted to, thus considering the operation of such parts of the parol evidence as may be considered legal, on the general merits, and on the answers of the court, to the many questions proposed by the counsel on each side, in their charge to the jury.

And the first question, which has engaged our attention is, what estate did *Frederick* take in this property, under his father's will: for if he only took a fee tail, or if it is even doubtful, it would be unjust to expose *Tobias*, first to a payment to *Frederick*, as if he held in fee simple, (unless he suffered a common recovery, or executed a conveyance in the form prescribed by law for barring estates tail, to the purchaser,) and then to damages on his covenant of warranty, or bond of indemnity.

On this point, the court have found no difficulty, and it is well for the plaintiff in error they have not. It would be to him a very disastrous victory; for in that event he would lose all.

In forming a conclusion, as to the true intention of the testator, the mind is free from the control of all technical limitations, or the meaning of legal phrases. Did the interpretation rest on the first part of the will, there could be no doubt but that a fee simple in the lot is devised to *Frederick*. He gives him the corner lot, with the house upon it, as his own property. The devise is of real property; and where it is so applied, *property* is a word large enough to carry the interest in the estate. It is stronger than "all my real and personal effects," which have been construed a fee. *Cowp.* 290. There Lord MANSFIELD said, the word "effects," is synonymous with substance, and property generally

(Stoever v. Stoever, for the use of his creditors.)

is every property a man has, to be enjoyed as his own. The very question was decided in *Morrison and others v. Semple*, 6 Binn. 94, that a devise of all my real and personal property passes a fee. It is very doubtful, whether the appendix related to the lot, or was confined to the legacy of personal effects; and if it was doubtful, then, as it does not *ex vi termini* include land, it ought not to be so construed. The word legacy, where by direct reference, or manifest implication, it is applied to real estate, will pass it. *Rossiter v. Simmons*, 6 Serg. & Rawle. It is to be observed, that in the devising clause, the lot is immediately to be his own property: but the personal property he is not to be master of until 21. He had declared, that his son immediately should have the lot as his own; but the other legacies he was not to be master of until 21. He might well intend to provide for the event of his dying under 21, without issue, and *currente calamo* add, or if he should die after he comes to his lawful age, the above legacies, or what shall be left of them, shall be sold, which naturally refers to personal property, the furniture, which might be worn out or broken, or the money which might be spent. It is at best but mere conjecture, involved in obscurity, which should not change an express devising clause, nor limit an absolute estate given in the first part of the will. But if it did mean real estate, the lot, then, what is the devise over? Such part only as should be left; thus admitting a right of disposition. Such part of the personal estate as should not be consumed by him, and such part of the realty as had not been disposed of by him in his life time, on his death without issue, is limited over. It is not fit to cast a shade on this title, by deciding, that it is doubtful, and that in order to entitle the plaintiff to recover, he should bar the entail. It is not doubtful, and this is no impediment to the plaintiff's right of recovery. *Frederick Stoever* had the right or power to dispose of it in fee simple.

On the writings, the conveyance with the defeasance, was this a mortgage? Where the question, whether mortgage or not, depends solely on the writings, it is purely a matter of law, and ought not to be left to a jury: otherwise, if it depends partly on parol evidence. *Wharfe v. Howell*, 5 Binney, 499. The question is sometimes complex and intricate, and it is difficult to draw a line of discrimination, which shall be, at the same time, precise and equitable, between mortgages and conditional sales. But here there are such strong features, that it is impossible to mistake the parentage of these instruments, the family stock from which they spring. The defeasance, I consider as incorporated into the deed. In its first concoction, was this a conditional sale, really intended to be actual, on the non-payment of the money, on the day prescribed, or was it a security for the payment of the money. It is impossible to deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money, at a future day. Such con-

(*Stoever v. Stoever*, for the use of his creditors.)

tracts are not prohibited by the policy of the law, but the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances, which control the perfect and free exercise of the judgment, than the borrowers, the effort is frequently made by persons of this description, to avail themselves of the advantage of this superiority, in order to obtain inequitable advantage. Taking up all the cases on this subject, it will be found, that the leaning of the court has been always against them, and doubtful cases have been decided generally as mortgages. *Conway's Executors v. Alexander*, 7 Cranch, 218. The form of this defeasance is pretty conclusive evidence, that it was intended as a security for the payment of money loaned by *Tobias* to *Frederick*. It recites, that *Frederick* now oweth to *Tobias* the sum of £ 1800, for which sum of money, or securing the payment thereof, the said *Frederick* did, by conveyance bearing the same date, convey the lot of ground to *Tobias*. Thus in the very outset, we have the explicit declaration, that the conveyance was executed for securing the payment of £ 1800.

An estate cannot be a mortgage at one time, and an absolute purchase at another. The very fact, that the sale was conditional, implies an expectation to redeem. But the concurrent agreement gives a power of redemption, limited, in point of time, as clauses of redemption are. A conveyance may be considered as a mortgage, though the defeasance be on a separate paper. *Dimond's Lessee v. Enoch*, Addis. 357. There is sometimes a difficulty in disquisitions of this sort, in drawing a line between mortgages and conditional sales. The great desideratum, which Courts of Chancery make the ground of their decision, is, whether the purpose of the parties was, to treat of a purchase, the value of the property contemplated, and the price fixed; or whether the object was a loan, and the security of the pledge for re-payment intended. *Robertson v. Campbell*, 2 Call, 428. *Wheeland's Lessee v. Swartz*, 1 Yeates, 579.

The answer of the court to the plaintiff's second point, and fifth point, is erroneous. It was not the purpose of the instrument to vest the fee simple absolutely in *Tobias*, for the purpose of a sale, and for the proceeds after payment of his own debt, to render him responsible as a trustee for *Frederick*; and if there was any covenant to that effect, then this action could not be supported. Besides, this is totally inconsistent with the answer to the first question, which expressly recognizes that the contract was a mortgage. The answer to the first point decides both the question of law and fact. If it depended on the writings only, then the parol evidence was inadmissible. But, as it was admitted, and depended partly on the parol testimony, whether it was a mortgage or conditional sale, it ought to be left to the jury. *Wharfe v. Howell*, 5 Binn. 499.

This was expressly decided in *Wharfe v. Howell*, 5 Binn. 499, where A., in consideration of \$ 200, executed and delivered to B.

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an absolute deed in fee simple, of land worth \$800; and, at the same time, B. executed and delivered to A. a deed of defeasance, conditioned, that if A. should, within three months, pay to B. the sum of \$200 without any deduction, the first deed should be void, and B. should reconvey: and, at the time of executing the deeds, the scrivener stated to the parties, that the writing would operate as a mortgage: it was held, that though there was no covenant for the repayment of the money lent and interest, the writings constituted a mortgage, upon which the lender might recover the money due by *scire facias* and sale, and the borrower recover the premises in ejectment, and, if the rents and profits received by the lender up to the time of trial were equal to the money lent and interest, without bringing the money into court. Thus, the want of a covenant to repay makes no difference, as has been decided in many cases; particularly 2 *Atk.* 296. 1 *Wash.* 14. *Ross v. Norvall*. This case is stronger than *Wharfe v. Howell*. There the scrivener was suffered to swear, that the defeasance was intended as a mortgage; here the very agreement states the conveyance to be a security for the payment of money. It is in terms, redeemable within three years. Now the time of redemption is, in equity, in general unimportant; for the redemption cannot be clogged. Chancery would decree a reconveyance after the stipulated time, and the parties cannot by their own agreement preclude the chancellor from granting relief; for their agreement cannot alter what the court says are the special terms of that contract. But this, applied to the case of a purchaser, is quite a different consideration. If from a view of the circumstances in the first instance, the transaction appear to have been intended as a mortgage, such circumstances would vitiate the sale, and turn the absolute conveyance into a mortgage, and the provision will be rejected, as repugnant, on the rule in equity that the right of redemption cannot be restrained or limited. I am, therefore, of opinion, that these two instruments constituted a mortgage, and not a conditional sale—a security for a debt, and not a purchase of the property.

But the difficulty in my mind has proceeded from the ejectment, and the agreement filed of record, accompanied by possession, acquiescence, valuable improvements, and the debt being at that time the full value of the property. This is a very serious inquiry, giving to the verdict in ejectment only the weight of a foreclosure in chancery. It is not conceded that the mortgagee may redeem at any time, within twenty years after foreclosure. But this presents a different question, in a case where the instrument is not strictly a mortgage at law, and where at law the time is material, a different case from a forced judgment without any terms stipulated, or advantage conferred on the defendant by the agreement; and where there is a benefit conferred, and where no advantage being taken of the necessity of the defendant in the ejectment, a full and fair price is allowed for his property; as much, or perhaps

(Stoever v. Stoever, for the use of his creditors.)

more than it would bring on a forced sale by *levari*, and the defendant in the action goes into possession of it as his own, continues in possession and improves it as his own under the eye of the former owner, that owner an insolvent debtor, not returning this as his property to his assignees after the lapse of years; when, if the property had been consumed by fire, all would have been his loss, merely because the property by fortuitous circumstances, has risen in value, and the bargain turns out a good one, he should, having made a sale, be converted into a trustee, a bailiff, and receiver of the rents, and as such to render an account, is a pretence of equity that I cannot feel, which touches not my conscience as a chancellor, and my sense of justice revolts from such a principle: and if a Court of Chancery would not interpose in the plenitude of their equitable jurisdiction, I would not assume such jurisdiction, nor ought it to be confided to any jury. If the estate had remained in the hands of *Tobias Stoever*, would the chancellor have directed a reconveyance on payment of the debt, after deducting the rents and profits? If he would, then the plaintiff, or his assignees are entitled to recover the surplus beyond payment of the debt, interest, and all expenses. In *Bloodgood v. Zeily*, 2 N. Y. C. E. 125, it was decided, that if a mortgage be forfeited, and execution sued on a judgment recovered on the bond, and a conveyance to secure a portion of the mortgage money be made of other property, redeemable on paying a certain sum, at a future day, such conveyance will partake of the original transaction, and be deemed a mortgage, and not a defeasible purchase; and, therefore, if after lapse of the day of payment, these lands be sold to a *bona fide* purchaser, though the purchase will not be impeached, the grantee will be compelled to account; and the sum at which the land sold, with interest, he will be responsible for, though the grantor did not demand a redemption for more than five years after the day of repayment. Where the mortgagee proceeds by ejectment, provision is made by statute of 7 G. 2, "that in all actions at law, relating to mortgages, on monies secured by bond and mortgage, or in ejectments, if there is no suit in equity to foreclose, the tender of principal and interest and costs, by persons having a right to redeem, pending such action, and (upon refusal to accept,) bringing the money into court shall be deemed a satisfaction, and the court may compel the mortgagee at mortgagee's costs, to assign, &c." This judgment in ejectment I consider as a foreclosure, on terms agreed. Now equity will not enlarge the time for the mortgagor to redeem, after six years' acquiescence under a foreclosure, by his own agreement; especially if there be any improvement on the estate. *Lant v. Crisp*, 15 Vin. 469.

So there shall be no redemption after long possession, settlement made, and estate improved. A note was given at the time of the release of an equity of redemption, that the releasor should have land reconveyed to him upon payment of what was given for the

(Stoever v. Stoever, for the use of his creditors.)

land, within a year; such payment having been neglected for several years, it was held, there should be no redemption.

It is a strong ingredient in this case, that the mortgage money was nearly equal to the value of the estate. There is no general rule in chancery as to the exercise of jurisdiction in opening foreclosures, either with respect to the time which will be considered a bar, or to the particular circumstances which will entitle a suitor to the interposition of the court. For cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends in a great degree upon its own combined circumstances; and may rather be considered as an instance of the fact, that the court will interfere to open a foreclosure, than as a general rule. *Pow. on Mort.* 499. *Lant v. Crisp*, 2 *Eq. Ab.* 599. 2 *Br. P. C.* 111, is a case entirely apposite to this, where the mortgagee, in 1781, entered into possession upon a foreclosure made absolute by consent, and considering himself as having an absolute estate in the mortgaged premises, by virtue of the decree, proceeded to make improvements therein, by pulling down buildings that were ruinous. The mortgagor, six years after, in 1787, moved the court for further time to redeem, and it was so ordered, on terms: but this, and several other orders grafted thereon, were reversed on appeal to the House of Lords; upon the ground, that it was not consistent with the practice of Courts of Equity, or warranted by precedent, to enlarge the time for redemption, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent; especially after an alteration had been made in the estate, either by pulling down the buildings, enlarging them, or otherwise; that the appellant had been two years in possession before he began alterations on the estate, having such a title as would satisfy a purchaser. But *Hollingsworth v. Fry*, 4 *Dall.* 345, is still stronger. There, in an action of partition, brought by *Hollingsworth* against *Fry*, after jury sworn, a juror was withdrawn, and an agreement entered into, that judgment should be entered on that day in Bank, unless the plaintiff, or *Robert Ralston* his assignee, should give security to pay one moiety of all the monies expended by the defendant in improvement of the land in question; and, if such security should be given, then the question of what money the defendant was entitled to, should be ascertained by three referees mentioned in the agreement, and the money being fully discharged and paid within the period of six months, judgment in partition to be entered for the plaintiff: but if not paid, then the defendant to hold the mills, &c. free and discharged from the claims of the plaintiff, and all persons claiming under him, and judgment to be entered for him in the action. The plaintiff gave the security required; the referees reported a sum due to the defendant: a number of exceptions were filed to this report, &c. 2d *July*, 1791. Judgment was given on it in the Supreme Court. On the 26th *September*, 1796, *Hollingsworth* sent his son to tender to the defendant the

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amount of the report, which he refused to accept, and filed his bill on the equity side of the Circuit Court of the *United States* for *Pennsylvania* district, alleging fraud in the defendant in making up the accounts, for a discovery and account, perpetual injunction on the judgment, partition and general relief. This bill was dismissed; and PATERSON, Justice, observed, that "the great rule of interpretation, both with respect to deeds and contracts, is, to put such a construction on them as will effectuate the intention of the parties, if such intention be consistent with the principles of law. In the present case, there is no difficulty in coming at the intention, as it is clearly and forcibly expressed in the agreement, and is capable of receiving one construction only. The time of payment is made a substantial, and not a mere formal circumstance. It enters into the essence of the contract, and, therefore, must be observed. The court cannot decree against the legal and express stipulation of the parties themselves. The situation of the parties, the nature of the property, and the speculative spirit of the project, were powerful inducements for drawing up the agreement in the plainest and strongest terms, so as to leave no doubt of the intention, and to render the time of performance a cardinal point. Again; if the agreement would admit of another construction, the complainant comes too late to avail himself of it. The door of equity cannot remain open for ever. The complainant did not make a tender of the money, till the lapse of five years after the termination of the time limited by the contract. So far was he from using legal diligence, that he has been guilty of gross delay. In cases of the present kind, equity will not suffer a party to lie by, till the event of the experiment shall enable him to make his election with certainty of profit one way, and without loss any way. This mode of procedure was unfair, contrary to natural justice, and in exclusion of mutuality."

In the present case, the agreement was as strong as the law could make it. It was an agreement made, drawn up, and signed by the counsel. If there had been any undue advantage taken of the defendant's necessities; if the mortgage money was greatly inadequate to the fair value of the property; if it would, on a sale on a *levari facias* have brought a much greater sum, the remedy of the defendant on the return of the *habere facias possessionem* would have been to have laid the equity of his case before the judges of that court, who, if they thought proper, might have interposed. But he suffered himself to be put out of possession, and did not avail himself of an appeal to the discretion of that court, but acquiesced for years. This circumstance was considered of importance in *Hollingsworth* and *Fry*.

If the grantee of land subject to power of redemption, have not all the remedies of mortgagee, the conveyance will not be considered as pignoratitious, but as a conditional sale: the first being subject to redemption, the second not. By the subsequent agree-

(Stoever v. Stoever, for the use of his creditors.)

ment if the property sunk in value, *Tobias* would have no remedy for the difference. He takes the risk on himself. It assumes a different character. The liabilities with regard to each other changed. By the first agreement, *Tobias* did not take all the risk himself. By the second he did. It would be against all equity that *Tobias* should be exposed to all the loss, while *Frederick* would enjoy all the good.

I am, therefore of opinion, that this agreement of record, with the subsequent act of record by *Frederick*, in his return of property when he obtained the benefit of the insolvent law, and the acquiescence in the sale by him and his assignees, the possession and alteration of the property by *Tobias*, and the improvements made would be binding on *Frederick*, and on his assignees. It is observed, that the assignment was not a clandestine one between the brothers, but an open one in a court of record, in an adverse suit, of which the assignees must be presumed conusant; and I think it would be against all conscience that *Frederick* or his creditors should, after the acquiescence, where any injury, destruction or deterioration of the property would be at the risk of *Tobias*, reap the benefit of a rise in the property, while they remained unaffected by any fall; and as there was no mutuality, so there is no equity. The opinion of the court on many of the questions, particularly as to the effect of the defeasance, constituting the transaction a mortgage, and not a conditional sale, was correct. But the answer to the fourth question of the plaintiff below, which went to the root of the plaintiff's claim, was radically erroneous. For we must suppose the question put to the court, to have relation to the judgment confessed in this ejectment, and to the agreement of the parties in such case; under such circumstances it never can be, that the mortgagor has 20 years to redeem.

We, however, are to consider whether the parol proof was admissible, and if admissible, what effect it ought to have. In one point of view, it was clearly admissible, as evidence to show a prolongation of the time of redemption, and to lessen the effect of the acquiescence. The evidence was, at least in that point of view, relevant. Nor has the plaintiff in error succeeded in showing, that any of the witnesses were incompetent. This evidence should go to the jury, as showing an understanding between the brothers, that advantage was not to be taken of the lapse of time. It might have caused *Frederick* and his assignees to delay a tender of the money, and so far would be fraudulent. This evidence was weakened by the act of *Frederick* in not returning the property, or noticing it any way in his schedule. This would be powerful evidence to show, that the agreement was final. For no man would pretend to say, that *Frederick Stoever* could be indicted for perjury, in not returning it; and the notice of *Frederick Stoever* to purchasers, connected with the agreement, and with his omission to return it, though not operating as a bar to creditors, yet is persuasive evidence to show a

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dereliction and abandonment, and to disprove the existence of any subsisting agreement to redeem, and that the lapse of time was considered as peremptory: which it certainly is on every foreclosure by consent and time given, unless when the estate is of so much greater value than the incumbrance, as to show an advantage taken of the mortgagor's necessities: so gross an inadequacy would call for the interposition of chancery, on that ground alone. I am inclined to think that these subsequent declarations would not amount to a contract, or give a new cause of action, as they would, unconnected with the former transaction, be merely gratuitous, and would not form any consideration, either legal, equitable, or moral, on which to ground an assumpsit, but that the whole matter is open to inquiry, and that it would be a fact for the jury to decide, whether there was evidence to satisfy their minds, that the time of redemption was prolonged by mutual agreement, and that the defendant in error and his creditor's acquiescence was occasioned by these declarations. For if *Tobias* acted upon it as a redeemable interest, and *Frederick* and his creditors did not abandon the right, but were lulled into security by the declarations of *Frederick*, I think equity would still so decree. Some of the acts of *Tobias* are quite inconsistent with this, his repairs, improvements, additional buildings, and certainly the conduct of *Frederick* and his assignees are inconsistent with this. Their parol declarations, if the agreement was fair, would not, after this lapse of time, improvements made, where the incumbrance was nearly equal to the value of the property, merely because from adventitious circumstances, the property rose in value, be a ground of relief in chancery. Nor ought they in this action, which is in the nature of a bill in equity; unless the lapse of time was occasioned by these declarations.

Bill to redeem after decree of foreclosure 15 years before, suggesting fraud and surprise in obtaining the decree, and a parol declaration both before and after the decree, that the mortgagee was willing to take his principal, interest and costs, and quit the estate; defendant pleaded the decree, and denied the fraud. Depositions of several witnesses were read to prove such a parol declaration by the mortgagee. Bill dismissed with costs, the chancellor declaring it would be dangerous to open decrees on such parol declarations. 7 Vin. 398. The clause respecting a sale which might be occasioned in three years and three months, by the death of either *Tobias* or *Frederick*, and where provision is made, that the surplus should be paid to *Frederick*, and the deficiency made up to *Tobias*, does not relate to any subsequent sale, and has no bearing on the question further, than to show, that it was considered as a security, and nothing more. For if the lot sold for more than the £ 1800, and interest, *Frederick* was to have it; if less, *Tobias* was to be paid the amount of his debt by *Frederick*. Thus stamping the instrument with the seals of a mortgage, and not with the impressions of a conditional sale. It is of some importance to inquire, whether,

(Stoevers v. Stoevers, for the use of his creditors.)

under these two instruments, *Tobias* could have brought a *scire facias* under the act of assembly. This is the criterion between mortgages and conditional sales, a redeemable quality in the grant, and right to exact the whole money, if the property was of less value than the money advanced.

This court are of opinion, that the agreement rendered the estate defeasible, and both instruments, the conveyance, and defeasance, constitute a mortgage. The objection is a technical one, that it is not expressed that the conveyance should be void on payment of the money secured in three years, but that on such payment the grantee shall reconvey. The defeasance expressly recites the conveyance to be a security for money due. It is, therefore, manifest, that the land conveyed was intended as a pledge only; and notwithstanding the manner of the grantor receiving back the pledge on his payment of the money, is by a re-conveyance, yet the nature of the conveyance remains the same. It is not absolute, but conditional, and must be considered as a mortgage, which the parties could by no terms render irredeemable. See *Erskine v. Townsend*, 2 Mass. 497. But they consider the agreement, the ejectment, the possession taken immediately, the improvements made by *Tobias*, the acquiescence of *Frederick* and his creditors, present such a case, as that a Court of Chancery would not interpose; and that the plaintiff has no cause of action, unless the jury were satisfied, from the whole evidence, that there was a distinct agreement by *Tobias*, to enlarge the time of redemption, and that in consequence of this agreement they rested in security—in one word, that *Tobias*, *Frederick*, and the assignees of *Frederick*, acted upon this, always, as a redeemable interest; that *Frederick* and his assignees were lulled into security by *Tobias's* agreement, a distinct agreement subsequent to his obtaining the possession, and not mere loose conversations of the gratuitous intentions of *Tobias*.

The action is properly brought in assumpsit. In no other form could it be supported. If there was a Court of Chancery, *indebitatus assumpsit* for money had and received, would lie in such a case as this. That action is in the nature of a bill in equity, in which the plaintiff can recover every thing which in equity and good conscience the defendant ought to refund. But where there is no Court of Chancery, and where there is no covenant or agreement under seal to pay the surplus after discharging the mortgage, it is the only appropriate action.

But there are two counts; the first certainly is unnecessary, and whatever is unnecessary is always exposed to danger. The consideration on the special contract, was altogether past. It was in consideration that plaintiff had before that time sold and conveyed to defendant, he then assumed upon himself, &c. But this might be cured by verdict. For the rule of law is, that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party express or implied, at the time of performing the consid-

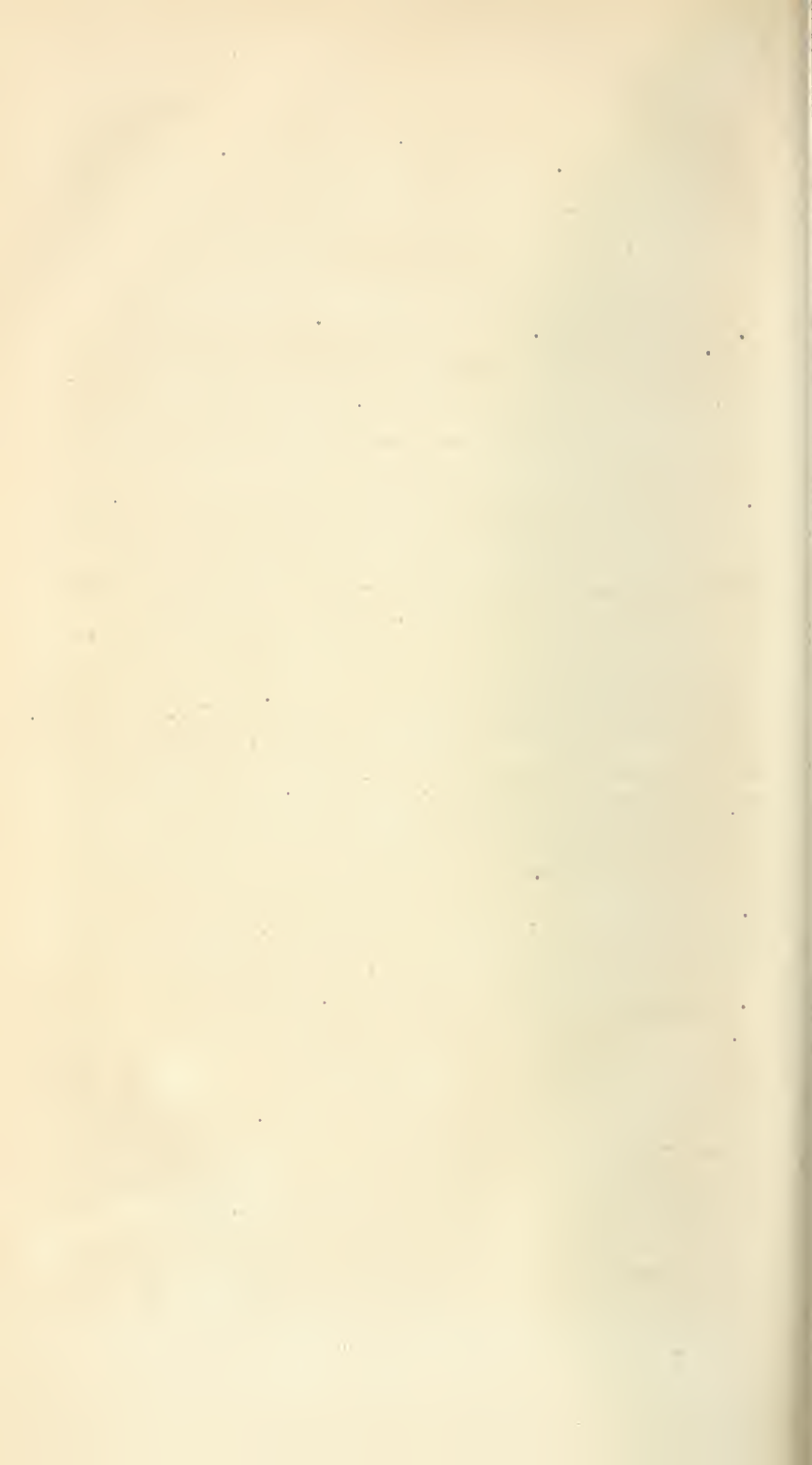
(Stoever v. Stoever for the use of his creditors.)

eration. Where there was an express request, it would be at all times sufficient to support a subsequent promise. Where there is a verdict, a request would be implied. *Osborne v. Rogers*, 1 *Wms. Saund in Notes*, 264. But this special count is at variance with the proofs in the cause, and with the whole controversy between the parties. It is not because the plaintiff sold and conveyed his land to the defendant, that he claims this money; but because he did not sell but mortgaged.

But there is one objection to this action, that has not been answered, and it is because it could not be answered; for all that was debateable has been well argued. That is, that the action could not be supported by *Frederick Stoever*. By the assignment, under the insolvent debtor's act, the property passed instantly to the assignees, was transferred to them; and they are authorised to sue in their own names.

An insolvent debtor, who has made a general assignment of his property cannot maintain an action in his own name, where the cause of action accrued previously to the assignment. *Young v. Willing et al.* 2 *Da'l.* 276. Thus, one discharged as an insolvent debtor, on assigning all his property to trustees, cannot support an ejectment for land previously vested in him, though his trustees have not given bond pursuant to the act of 4th April, 1798. *Willis v. Row*, 3 *Yeates*, 452. The interest which *Frederick* had, if any, was an equity of redemption, which passed to his assignees. The trustees have not released to him: the debts not being paid, they could not. It would be a fraud on the creditors.. Though the surviving trustees have joined in this instrument, it is not in the character of trustees, but of creditors. The assignment is not by the body of the creditors, but only some individuals, and it is for their use, which is in fraud of the other creditors, and beyond the scope of the authority of insolvent assignees. But if they had assigned as trustees, if all the creditors had assigned, and empowered him to sue in his own name, this would not authorise him to bring the action in his own name. The right to an equity of redemption might be a transferrable interest, and the person entitled might, on tender of the mortgage money, bring an action in his own name. But when this assignment was made, and power of attorney given, it was a right to recover a sum of money. They could no more authorise *Frederick Stoever* to bring an action in his own name, than they could a stranger. The assignee of a chose in action, must always bring the action in the name of the assignor, unless where positive law has declared he may, or the instrument is negotiable. The legislature only can confer this authority: the assignor cannot. It cannot be, that two different persons possessed each a right to prosecute the same action in his own name.

For these reasons the judgment is reversed.



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4. In a suit against the maker of a promissory note made payable without defalcation by an indorsee to whom it was passed for a valuable consideration and in the course of business, evidence cannot be given by the defendant under the plea of payment of a failure of the consideration for which the note was given, though such note be not dated in Philadelphia city or county, nor discounted by a bank, nor deposited in a bank for collection. *Lewis v. Reader.* 193
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1783, at which time his nephews W. H. and A. H. were both living and also the said A. H.'s first son J. and second son A. A. H. died before his brother W. H. leaving issue two sons J. and A. and four daughters. W. H. died without issue. After his death, J. son of A. H. conveyed the land by deed of bargain and sale to T. P. in fee. To this deed A. was party and it was declared to be to make T. P. tenant to the *præcipe* in a common recovery which was to be suffered for the purpose of vesting the fee simple in J. H. It was accordingly suffered in the Supreme Court at March term 1803, with treble voucher, the said T. P., J., and A. being severally vouched.

Held, that J was seised of an estate for life in possession with contingent remainder to his sons successively in tail male, and that A. had an estate for life vested in interest, with contingent remainders to his sons successively in tail male, after which a remainder in tail general was vested in J. with remainder in fee simple vested in J. and A. and their sisters, that the recovery was well suffered, and J. by it became seised of an estate in fee simple in possession. *Lyle v. Richards*: 322

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1. A deed for land accepted by the vendee after articles of agreement, though it differ in some respects from the articles, is to be considered as expressing the ultimate intent of the parties, where there is no misconception

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Crotzer v. Russel. 78.

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1. If the declaration on a bond for the purchase money at sheriff's sale omit to state a sale, it would be bad on demurrer; but if the defendant go to trial after pleading payment, and giving notice of special matter which sets forth the sale, the defect is cured by the verdict. *Friedly v. Scheetz.* 156.
2. A declaration in assumpsit by a vendor on a contract of sale of real estate, ought to state a positive assumption by the defendant, and if the vendor contracted to make a good title, that he was seised of a good estate in fee simple. *Hampton v. Speckenagle.* 212.
3. It seems a general averment that the plaintiff was ready and willing, and offered to perform his part of the contract, is good after verdict. *Ib.*
4. If a general verdict be given on several counts, some of which are for demands not within the jurisdiction of the court, it is bad for the whole. *Kline v. Wood.* 294.

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See FORMER RECOVERY, 1. LEGACY, 4. ELECTION, 3. EVIDENCE, 17. TESTATOR, 1.

1. A devise of a lot with a house upon it to A. as his own property, and of certain specific legacies, of which he was not to be master till his full age, and in case he died before lawful age, or after such age without issue, then all and singular the above legacies, or what shall be left thereof, to be sold and divided among other children, carries a fee simple in the lot and house. *Stoever v. Stoever.* 434.

DISTRICT COURT.

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1. Where some of the counts of the declaration in an action of assumpsit were for damages sustained by the defendant's selling to the plaintiff an unsound horse for the sum of 80 dollars, and the verdict was for 40 dollars, held that the cause of action was not within the jurisdiction of the District Court for the city and county of *Philadelphia*, though these counts averred that the plaintiff had been put to expense in feeding and keeping the horse to the amount of 150 dollars. *Kline v. Wood.* 294.
2. The District Court has not jurisdiction in case of contract, where the value of the thing put in demand by the plaintiff's declaration is under 100 dollars. *Ib.*
3. The District Court has not jurisdiction wherever the plaintiff could not recover costs if he had sued in the court of Common Pleas, before the erection of the

District Court, without having filed an affidavit. *Ib.*

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1. A possession to prevent a recovery, or vest a right under the statute of limitations, must be actual, continued, adverse and exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant exclusive and adverse: but a continued exclusive possession and enjoyment with the knowledge and acquiescence of the owner of the inheritance for 21 years, would be evidence from which a jury might presume a right by grant or otherwise to such easement. *Cooper v. Smith*. 26.

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1. In an action of ejectment, to which the general issue is pleaded, it must appear that the defendant dispossessed the plaintiff, or was in the actual possession of the land. *Cooper v. Smith*. 26.
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3. Where the defendant in ejectment has only an equitable title to hold real estate till certain moneys are reimbursed, the plaintiff is entitled to recover if such moneys are reimbursed at the time of trial: but if the defendant has a legal title of that description the plaintiff cannot recover, unless the moneys were reimbursed at the institution of the ejectment. *Thomas v. Wright*. 87.
4. A contract that a person shall occupy a house and put it in repair, and in consideration thereof should enjoy the property at a certain rent till the repairs were reimbursed, makes such person a tenant from year to year, and not liable to ejectment when the contract is ended without notice to quit. *Ib.*

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2. In a suit against a justice for not certifying a recognizance entered into by the plaintiff, in consequence of which, the plaintiff's appeal from the judgment of the justice was dismissed, evidence is admissible that the plaintiff tendered bail to the justice more than six months before the suit against the justice, because, though this was before the six months, the neglect to certify the recognizance may have been within that period. *Prather v. Connelly.* 14.
3. Parol evidence of the declarations of the grantor is admissible to prove the identity of a lot referred to in a deed by him, conveying certain "lots in the town of H. marked on the recorded plan of the said town," notice having been given to one of his executors, a defendant in the suit, and he having proven that he never saw any such recorded plan, and the records of the proper county having been diligently searched without finding any recorded plan. *Patton v. Goldsborough.* 47.
4. Confessions by a grantor that he had conveyed a certain lot, are evidence against him and his executors, of the identity of the lot referred to in the deed, but evidence of the declarations

- or acts of the grantor subsequently to his deed is not admissible to defeat the grant, by showing that it was not the lot referred to. *Ib.*
5. The declarations of a vendor after a sale, who is not party to the suit, are not evidence, especially, to contradict a written instrument. *Brindle v. McIlvaine*, 74
6. Where the defendant in a suit on a bond for part of the purchase money of land, sets up a defect of title and misrepresentation as a defence, a recovery in a former suit on another bond for part of the purchase money, on which it is alleged the same defence was made, is no reason why the court should reject the evidence of the defendant: whether the same matters had been tried in the former action is for the jury. *Crotzer v. Russell*. 81.
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1. After a *fi. fa.* has been levied on real property which has been condemned, the plaintiff cannot abandon these proceedings, and take out a *ca. sa.* without the leave of the court. *Bank of Pennsylvania v. Latshaw.* 9
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4. The privilege of a stay of execution under the appraisement act of 28th March, 1820, expired

with that act, and existed afterwards in relation to executions issued while that act was in force only as modified by the act of the 27th March, 1821. *Ib.*

5. If the legislature give an indulgence of a stay of execution to a debtor, it may afterwards modify or withdraw it. *Ib.*
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7. Nor will the court in such case inquire into the existence of liens on the land; though they would apply the proceeds to them, if valid, when the money is brought into court by the sheriff. *Ib.*
8. If a subsequent judgment creditor buy in a prior mortgage and judgment, and under the latter levy on lands of the debtor not included in the mortgage, with a view to the payment of his own judgment out of the mortgaged property, the court will not interfere on motion, to relieve one claiming the land levied on under a voluntary conveyance by directing the creditor to proceed against the mortgaged premises, though it seems they would in favour of a purchaser for a valuable consideration. *Ib.*

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1. If the creditor makes his debtor executor, the debt is still assets so far as respects the creditors of the testator, or a residuary legatee. *Pusey v. Clemson.* 204

2. No rule can be established as to the amount of commissions of executors that will suit every case. In common cases five per cent. has been fixed as the standard by common opinion and understanding, but in the discretion of the court it may exceed or be less than that sum. *Ib.*
3. When the value of the estate was near 100,000 dollars, and the executors had little trouble or hazard, the care of law-suits being intrusted to counsel, who were paid by the estate, and there being more than sufficient to pay debts, and the receipts by the executors were in large sums of money, the court held three per cent. a reasonable allowance. *Ib.*
4. If an executor make a compromise, which is intended for the benefit of the estate, and has actually been for its benefit, he ought not to be charged with the debt. *Ib.*
5. Twelve dollars allowed to executors as a fee paid to an attorney for stating and preparing their accounts, but nothing beyond that for advice as to the mode of stating it. *Ib.*
6. Commissions of executors fixed at three per cent. upon settling an account to the amount of 37,000 dollars, which principally consisted of bank shares transferred to the legatees, though the executors were also to pay some annuities, clothe and educate children, and distribute some dividends of bank shares in charities, there being no evidence of the degree of trouble the executors had had in these respects. *Joseph Walker's Estate.* 223
7. The number of executors is not to make any difference in the rate of commission. If their trouble is unequal, a share of the commission ought to be assigned to each, proportioned to his trouble. *Ib.*
8. Commission should be paid for services when rendered, not by anticipation for such as may be done in future. *Ib.*
9. One devised the residue of his real and personal estate after payment of his debts to the discretion of his executors to distribute in such manner as they might think proper, and appointed three executors all of whom died indebted to the estate, without making any distribution. Held, that the Register's Court might, in its discretion, appoint the son of the surviving executor, who was an administrator to his father, administrator *cum testamento annexo*, he being of fair character, and having given good security, and no claim being made by any next of kin, nor opposition by the commonwealth under a claim by escheat, nor by creditors. *Case of Richard Neavès' Estate.* 187
10. A person taking out letters of administration in *Pennsylvania*, may be sued in *Tennessee* for a debt due by the intestate. *Evans v. Tatem.* 252

EXONERETUR.

See BAIL, 3.

FEME COVERT.

See HUSBAND AND WIFE.

FERRY.

1. The act of assembly of *March* 11th, 1784, authorising John Sumral to establish a ferry over

the Youhiogany river, did not vest in him a right to land upon the landing of any person without their consent. *Cooper v. Smith.* 26

FORMER RECOVERY.

See ELECTION, 3. EVIDENCE, 6.

1. A former recovery in an action for money had and received against an executor by a widow is only *prima facie* evidence that the whole amount with which the executor then charged himself in the settlement of his accounts was recovered; the plaintiff may in another action recover monies received since the bringing of the former suit, though contained in the account, if they were not before recovered. *Wilson v. Hamilon.* 424

GUARANTY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

HUSBAND AND WIFE.

1. The deed of a *feme covert* is void, if it do not appear from the certificate of her acknowledgement that she was examined separately and apart from her husband: stating that she voluntarily confessed thereto, will not cure the defect. Nor is the parol evidence of the magistrate admissible to show a separate examination. *Jourdan v. Jourdan.* 268
2. When the deed executed by a married woman is void, parol evidence is inadmissible to show that after her husband's death

she delivered and ratified it. *Ib.*

3. Circumstances may be proved from which the jury may infer such delivery. *Ib.*

JEOFAIL.

1. After verdict, the want of a verification in the assignment of breaches on a bond is cured by the statute 4 and 5 Ann. c. 16. *Carl v. The Commonwealth.* 63
2. A verdict cures the omission in such breaches to state that assets came to the administrators' hands. *Ib.*

IMPROVEMENTS.

See ROADS, 3, 4.

INCUMBRANCES.

See VENDOR AND VENDEE, 1, 2.

INQUISITION.

1. The day on which an inquisition was taken is not a matter of record but a matter in *fais*. *Thomas v. Wright.* 87

INSURANCE.

1. On the 3d July, 1818, A. who was going out supercargo of the ship *America* on a voyage from New York to the Isle of France and Calcutta and back, by a writing reciting that he was indebted to B. in 2500 dollars engaged to ship and consign to B. goods to that amount, arising from his outward commissions, and in case of death or any accident

happening to him assigned his commissions on the above voyage and the proceeds thereof to B.; and by another writing of the same date authorised B. to make insurance for 2500 dollars on his commissions out and the proceeds thereof out and home. On the 10th July, A. caused insurance to be made in New York for 4000 dollars for himself on commissions out and home, and delivered the policy to C. On the 15th August, B. had insurance made by the defendant in Philadelphia for 2500 dollars on commissions of A. valued at the sum insured out, and on the proceeds of said commissions as interest might appear, homeward, with the usual clause, as to a prior insurance. On the voyage home the ship was wrecked and A. drowned: but B. received an invoice and bill of lading of goods consigned to him on account of A. by the ship, amounting to 1500 dollars: some of the goods were saved, and claimed and removed by the New York underwriters, who paid part of their policy on a compromise with C. *Held*, 1. That this was not a case of a double insurance, that at New York and that at Philadelphia being on account and for the benefit of different persons.

2. The plaintiff had an insurable interest.
3. He was not bound to disclose to the defendant the particular nature of his interest. *Wells v. The Philadelphia Insurance Company*. 103
4. A valued policy of insurance was made of supposed profits on a cargo of goods on a voyage from Canton to Philadelphia free from average, and without benefit of salvage. The ship sailed from Canton with a cargo

but in consequence of bad weather put into the Isle of France for repairs: part of the cargo was so much damaged that it was thrown overboard; part being also damaged was sold and the proceeds re-invested; and these with the sound part arrived at Philadelphia; where it was found that part of those considered sound was damaged. The sound teas were sold at a considerable profit, but on the whole cargo there was no profit, and there was a loss of more than fifty per cent on the whole goods shipped. *Held*, that the underwriter was discharged. *Waln v. Thompson*.

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INSOLVENT.

See WITNESS, 6.

1. An insolvent debtor who has assigned his property cannot sue for a cause of action existing at the time of the assignment in his own name, though empowered by his creditors, and though the assignees have not acted. *Stoever v. Stoever*. 434

INSOLVENT.

See JUDGMENT, 4. LEGACY, 1. ASSIGNMENT.

1. The debtor is not exempted from the payment of interest by the continued absence of the creditor at a distance from the state, and his not being heard of for many years. Therefore, where bonds were given in Northampton county for a portion of a distributive share, and the obligee was then absent, and the last that was heard of him afterwards was, that he was at

Natchez, in 1806, and administration was taken out of his estate in 1818, on the presumption of his death, it was held that the obligor was bound to pay interest on his bond. *Case of Martin Shaffer's estate.* 263

2. Where the defendant paid money to the plaintiff which both parties thought the plaintiff was entitled to, but it afterwards turned out that the plaintiff was not entitled to it; *held* that interest ought not to be paid by the plaintiff till the defendant explained the mistake and demanded payment. *King v. Deihl.*

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ISSUE.

1. The words, "and issue," on the docket suffice to cure any defect of form in joining issue. *Carle v. The Commonwealth.* 63

JUDGMENT.

See JUSTICES OF THE PEACE.
AMENDMENT, 1. EXECUTION, 6,
7. DEBT, 1. MORTGAGE, 1.

1. When it appears by the record that after the return of summons, a rule was entered to declare, and after declaring the plaintiff entered a rule to plead, and signed judgment for want of a plea, the judgment is regular. *Shaffer v. Brobst.* 85
2. A party, on taking a bond and warrant, agreed by a separate writing not to enter up judgment, nor get it done by any body else. He afterwards assigned to another for a valuable consideration, without notice of the agreement, who entered up judgment.

Held, 1. That the judgment was valid.

2. That the obligee was a good witness to prove that the assignee had no notice of the agreement. *Davis v. Barr.* 137

3. A judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered till after the judgment. *Smith v. Black.* 142

4. On affirmance of a judgment in the Supreme Court after a writ of error, interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear interest. *McCausland Administrators v. Bell.* 388

But the plaintiff cannot in such case charge interest on the costs of suit until he pays them; though on payment he may charge interest from that time. *Ib.*

5. The judgment creditors of a vendee of land who has paid part of the purchase money and has possession of the land, but has received no deed, are entitled to the proceeds of the sale of his title under an execution in preference to the vendor. *Auwerter v. Mathiot.* 397
6. On the replication *quod habetur fide recordum*, and issue where the record is a record of the same court, the mere entry of the judgment by the court, without fixing a day, though informal is regular under our practice. *Shore v. Hunt.* 404

JURISDICTION.

See DISTRICT COURT. COURT OF COMMON PLEAS.

JUSTICE OF THE PEACE.

See LIMITATIONS, 2. EVIDENCE, 2.

1. When a justice of the peace has jurisdiction of a case, his judgment, though erroneous is binding on the parties until reversed on a *certiorari* or appeal. *Emery v. Nelson.* - 12

LANDS.

See TAXES, 1.

LANDLORD AND TENANT.

See EJECTMENT. PURCHASE MONEY, 1. TESTATOR, 1.

LEGACY.

See DEVISE, 1.

1. If a legacy be payable in instalments and the date of the last instalment expires before the testator's death, it is to be considered as a legacy payable generally, and carries interest from one year after the testator's death. *King v. Diehl.* 409
 2. Where in this state a legacy is granted to one, and afterwards over on the happening of a contingent event, the executor ought not to pay to the first legatee without security, if required to take security by the legatees over; and on action brought by the first legatee the court would require security before execution issued. *Ib.*
- But if such payment be made with the consent of all parties concerned, the executors would not be liable to the legatees over. *Ib.*
3. If a guardian pay to his ward

a legacy bequeathed to him, then to others on a contingency, if that contingency happen, the guardian cannot recover it back as a trustee for the legatees over; though the legatees themselves might recover it. *King v. Diehl.* 409

4. Where a testator orders land to be sold and certain legacies to be paid out of the proceeds, the surplus money after the payment of the legacies does not go to the executors or next of kin, as an undisposed of residue of personal effects, but results to the heir at law. *Wilson v. Hamilton.* 424

LIBERARI FACIAS.

1. A mere return to a *liberari* by the sheriff, that he had delivered possession to the plaintiff in that suit, does not vest the title in such plaintiff: it is only an authority to enter; and he must bring an ejectment, or obtain the actual possession before it can be considered in an ejectment between others, as a subsisting title in him, *Thomas v. Wright.* 87

LIEN.

See TAXES, 1.

LIMITATIONS.

See EASEMENT, 1.

1. If there be any thing in the plaintiff's case which entitles him to an exemption from the operation of the statute of limitations, he ought, when the act is pleaded, to set it forth in his replication. If he omit to do

so, and join issue on the plea, it is incumbent on him to prove an assumption within six years.

Witherup v. Hill. 11

2. The limitation of six months as to suits against justices of the peace, contained in the 7th section of the act of 21st March, 1772, may be taken advantage of by the justice, though not specially pleaded. *Prather v. Connelly.* 14

3. Defendant being arrested on a promissory note, said that he owed the plaintiff the money, and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he would keep him out of it as long as he could. Held, that this was not such an acknowledgment as would take the case out of the statute of limitations. *Fries v. Boisselet.* 128

4. The residence of a plaintiff within the State of *New-York* at the time when the debt accrued and since, does not bring him within the proviso of the act of limitations in favour of persons beyond sea. *Thurston v. Fisher.* 288

5. A party entitled to the benefit of the proviso, loses his privilege from the time he comes into the state, and a replication to a plea of the act of limitations, not stating that the plaintiff had not been in the state within the time allowed by the act, is bad on demurrer. *Ib.*

MANDAMUS.

1. The practice has been not to issue writs of mandamus, except from the court which sits in the district in which the persons reside, to whom the mandamus is

to be directed. *Commonwealth v. Clarke.* 59

MORTGAGE.

See EXECUTION, 6, 7.

1. If a bond and warrant of attorney are given, accompanying a mortgage, a sale of the land under a *fiery facias* and *venditioni*, issued on the judgment entered up under the warrant, avoids a lease made by the mortgagor after the mortgage, but before the entry of the judgment on the warrant. *McCall v. Lenox.* 302
 2. A deed accompanied with a written agreement between the parties of the same date, reciting that the deed was made for a certain sum due from the grantor to the grantee, or for securing the payment thereof, and stipulating that the grantee will not sell or mortgage the property for three years and three months, and will then deliver up the deed to the grantor, if the money is repaid by instalments within that time, and providing that if either party die, or the premises must be sold within that time, and more than the sum due, and interest are obtained, the surplus shall go to the grantor, but if less, the grantor shall supply the deficiency—is a mortgage. *Stoever v. Stoever.* 434
- If, however, the money is equal to the value of the premises, and the time fixed elapses without payment, and the grantee brings ejectment, on which a judgment is entered by agreement, stipulating, that in case of repayment by a certain day, the property shall remain in the defendant, otherwise, a writ of *habere facias possessionem* to issue, and the rents of the interval to be paid

to the plaintiff, and default of payment being made, a writ issue, on which possession is delivered to the grantee, who retains it and makes improvements, the grantor acquiescing by silence, and becoming insolvent, and making no return of the premises as his property, the grantee is entitled to the premises. *Stoeever v. Stoeever.*

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But parol evidence is admissible on behalf of the plaintiff, suing for the use of his creditors, to show a prolongation of the time of redemption, and to rebut the presumption of acquiescence, by the declaration of the grantee, that he intended after a sale, to pay the surplus to the creditors or children of the grantor. *Ib.*

3. On a mortgage of land with authority to the mortgagee to sell after a certain time, and to pay the surplus, if any, after satisfying the debt to the mortgagor, if there is no covenant or special agreement to pay, *indebitatis assumpsit*, lies for money had and received for a surplus arising from the sale. *Ib.*

4. If the question, whether mortgage or not depends solely on writings, parol evidence is inadmissible, but if it be admitted, and the question depends partly on that evidence, it should be left to the jury, whether it was a mortgage or not. *Ib.*

NOTICE.

See EVIDENCE, 3.

1. Where three executors were defendants, who had been notified on a former trial between the parties, to produce a paper, and

on the present trial, one of them had been notified, who swore that he had made inquiry of the other members of the family, and diligent search had been made and the paper could not be found, and the deed of the testator, under which the plaintiff claimed, referred to the paper, the notice was held sufficient. *Patton v. Goldsborough.*

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NOTICE TO QUIT.

See EJECTMENT.

ORDER.

See PAYMENT, 2.

ORPHANS' COURT.

See EVIDENCE, 12.

1. It seems the Orphans' Court cannot decree the payment of a distributive share, admitted by the administrator to be in his hands, where his accounts are filed in the Register's Office, and not brought into the Orphans' Court. *Flintham v. Forsythe.* 133

2. But where the accounts of an administrator are brought into the Orphans' Court, it may decree payment of a distributive share to one heir, where there is no dispute between him and the administrator as to the balance due him, although the accounts are, on the application of other heirs, depending before auditors. *Ib.*

3. The Orphans' Court cannot decree payment by an administrator of the costs recovered in a

suit brought against him by an heir in a court of common law, to recover his distributive share.

Ib. See DECLARATION. JUDGMENT, 6.
RECOGNIZANCE, 1.

PAROL EVIDENCE.

See HUSBAND AND WIFE, 1, 2.
MORTGAGE, 2, 4.

PAYMENT.

See BOND, 1.

1. The lapse of less than 20 years may, with other circumstances, afford a presumption of payment of a bond, but without circumstances, it must be at least 20 years to raise the presumption. *Henderson v. Lewis.* 379
2. The possession by the defendant of an order on him, signed by the plaintiff, to pay money to a third person, whose receipt is indorsed, but not proved, if not objected to as evidence to go to the jury, may be charged by the court to be evidence of payment, though not conclusive. *Weidner v. Sweigart.* 385

PARTNERS.

1. Assumpsit does not lie by one partner against another, unless there be an account actually settled between themselves, and a balance struck. It is not sufficient that the balance may be deduced from the partnership books. *Andrews v. Allen.* 241

PLEADING.

1. Where payment is pleaded and issue joined thereon, the short entry of set off added thereto, is only a notice and not strictly a plea, and therefore, requires no replication. *Henderson v. Lewis.* 379
2. Where the defendant pleads payment, to debt on bond, with leave to give want of consideration, and special matters in evidence, he can only give such matters in evidence as show that the plaintiff had no right to recover; but where he pleads payment with leave to give defalcation in evidence, he may give in evidence matter entitling him to recover against the plaintiff under the defalcation act. *King v. Deihl.* 409
3. In covenant on an agreement to make the plaintiff a title on a day certain, in consideration of which he was to give bonds, if he aver a readiness to perform, and the defendant put in issue by his plea the plaintiff's readiness to perform, it is sufficient on the trial, if the plaintiff show that the defendant had no title on the day: he is not bound to show performance or tender. *Knox v. Rinehart.* 45
4. In an action on a decree in equity in another state for the payment of money, the pleas of *nil debet* and *nul tiel record* are both bad on general demurrer. *Evans v. Tatem.* 252
5. If the defendant mean to deny the existence of such decree, he may frame a plea to meet the averment of the decree in the declaration, and such plea must conclude to the country. *Ib.*

POWER.

1. T. F. by bargain and sale conveyed all the parts and purparts, shares and dividends, of him, the said T. F., in the messuages, lots of ground, lands, ground rents, tenements and hereditaments, and real estate, which his father lately died seised of, to two trustees upon trust, that they and the survivor, and the heirs and assigns of the survivor, should during the natural life of T. F., let the premises, receive the rents and income, and pay the surplus, after deducting ground rents, &c. into the proper hands of T. F. and not to any agent he might appoint during his natural life, or apply the same to his maintenance, and from and after his decease, in trust for his children, in fee simple, and in case he left no children, then to and for the use of the right heirs of the said T. F. forever. Provided always, that it should be lawful for T. F. with the consent and approbation of the said trustees or the survivor of them, or the heirs of the survivor, by any deed under their hands and seals, duly executed and acknowledged, to grant or convey all, or any part of the premises, to such person or persons, and for such uses or estates as the said T. F., with such consent and approbation should direct, limit, or appoint. The real estate of the father was afterwards sold by order of the Orphans' Court, and with part of the moneys paid to the trustees, they purchased a house in the city of *Philadelphia*, which was conveyed to them on the same trusts; the residue was placed and con-

tinued at interest. T. F. made his last will, (subscribed by the trustees,) reciting their approbation and consent, testified by their subscriptions to the will, and devised to his sister, M. F., in fee, all the residue of his estate, after payment of debts, and died, leaving the said M. F., and the wives of the plaintiffs, with other brothers and sisters, his heirs at law. Shortly afterwards, the trustees executed a deed to M. F., in which, as far as the same might be necessary, they gave their consent and approbation to the said devise, and conveyed the estate to the said M. F. in fee.

Held, that the power reserved by T. F. was not well executed, and that the plaintiffs were entitled to a share in the house purchased by the trustees, and in the money at interest. *Slifer v. Beates.* 166

POSSESSION.

See SURVEY, 2. EASEMENT, 1.

PRESUMPTION.

See SURVEY, 2. EASEMENT, 1. PAYMENT, 1, 2.

PRINCIPAL.

See BAIL, 3.

PRIVILEGE.

See ARREST, 1.

PROMISSORY NOTE.

See BILLS OF EXCHANGE, AND PROMISSORY NOTES.

PRODUCTION OF PAPERS.

See NOTICE, 1.

PROTHONOTARY.

7. The court will not presume a rule to have been entered by the prothonotary of his own mere motion. *Shaffer v. Brobst.* 85
2. If such were the case the remedy is by application to the court below, and not by writ of error. *Ib.*

PURCHASE MONEY.

See TESTATOR.

1. The owner of land by a derivative title from the warrantee, is not personally liable for the purchase money: it is a charge upon the land. *Case of Keyzey, Executor of Keyzey.* 71

RECOGNIZANCE.

1. A recognizance of bail in error, is forfeited if the plaintiff in error *non pros* the writ by agreement with the other party, provided there be no fraud or collusion. *Share v. Hunt.* 404
2. But it seems fraud in *non pros*ing the writ, cannot be taken advantage of in a suit on the recognizance, under the plea of *nil tiel record*, or payment, but ought to be specially pleaded. *Ib.*

RECORD.

See JUDGMENT, 1. INQUISITION, 1. EVIDENCE, 1. FORMER RECOVERY.

REPLICATION.

See LIMITATIONS, 5. JUDGMENT, 6.

ROADS.

1. The description of a road prayed for by petition, as beginning at a dwelling house which is known, and ending at a public road, is sufficiently certain. *Road from Matthew Miller's House.* 34
2. A road from the plantation or dwelling house of a petitioner, to or from the public highway, or any place of public resort, as described in the 17th section of the act of 6th April, 1802, is a private road, to be laid out, &c. in the manner therein prescribed, and there is no authority in any Court of Quarter Sessions, to have it laid out as a public road. *Ib.*
3. The 77th section of the act for the improvement of the state, passed the 26th March, 1821, embraces those cases only in which, by the other sections, there is no special appropriation of the money subscribed by the state to future expenditures. *Commonwealth v. Hanover and Carlisle Turnpike Company.* 59
4. In such appropriations to future expenditures, the state treasurer is bound to pay the money subscribed to the Company, and it is no objection to such payment that a contractor objects to it, who claims for work done before the passing of the act. *Ib.*

RULES TO PLEAD, &c.

See JUDGMENT, 1.

SATISFACTION.

See ELECTION.

SEAMAN.

1. If a seaman ship at the port of *Philadelphia*, and render himself on board, and afterwards desert at *Chester*, on the voyage down the river, the surety is liable to the forfeiture imposed by the second section of the act of congress of the 26th July, 1790. *Behneke, v. King.* 151

SET OFF.

See PLEADING. WITNESS, 5.

1. Two defendants, sued jointly, may set off a debt due by the plaintiff to one of them. *Childerston v. Hammon.* 68
2. So if the debt be due by one for whom the plaintiff sues as trustee. *Ib.*
3. On evidence of set off offered by the defendants, whether or not the debt on which suit is brought, is equitably owned by the defendants debtor, is a question for the jury to decide; and it is error for the court to decide it, and reject the evidence *Ib.*
4. A debt due from the plaintiff to a co obligor with the defendant, who was not summoned, is not a set off against the plaintiff's demand on the obligor who is summoned. *Henderson v. Lewis.* 379

5. The separate debt due by the plaintiff to one co-obligor, cannot be set off against a demand against both. *Ib.*

SCIRE FACIAS.

See ADMINISTRATOR'S BOND, 1.

SHERIFF.

See EVIDENCE, 7, 15. INQUISITION,
1. LIBERARI FACIAS.

1. The sheriff is liable for an escape where he has returned *non est inventus* to a *capias ad satisfaciendum* which had been delivered to him, if prior to the return day, his deputy had the defendant in custody under another *capias ad satisfaciendum* and discharged him; though it do not appear that the sheriff knew of the latter writ, or the deputy of the former. *Wheeler v. Hambright.* 390

SHERIFF'S SALE.

See DECLERETION, 1.

1. A sheriff's sale cannot be objected to by the purchaser, merely on the ground of defect of title; it is binding in all cases, except where there is fraud or a misdescription of the property in some material respect. *Friedly v. Scheetz.* 156
2. A purchaser cannot object to a sheriff's sale a defect of title of which he had notice; when he has bought after publicly notifying at the sale such defect of title, he cannot give evidence thereof in a suit against him for the purchase money. *Ib.*

3. If the conditions of sale are that the purchaser shall pay in ten days, and the sheriff's deed shall be delivered at a subsequent day, and that if the purchaser refuses to comply the property will be sold at his risk, and the purchaser gives bond to comply with the conditions of sale, he is liable on the bond without a re-sale. *Ib.*

4. A sheriff's sale may be set aside where the purchaser may be injured in consequence of a misapprehension of the terms of sale occasioned by the act of the sheriff. *Auxwerter v. Mathiot.*

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STATE SUBSCRIPTIONS.

See ROADS, 3, 4.

STATE TREASURER.

See ROADS, 3, 4.

SURRENDER.

See BAIL, 3.

SUMMONS.

See JUDGMENT, 1.

SUMRAL, JOHN

See FERRY.

SURVEY.

1. A survey is not evidence without showing an authority to make it, or proving that such au-

thority existed and was afterwards lost. *Wilson v. Stoner.* 38

2. Possession upwards of 30 years under a survey found in the handwriting of an assistant deputy surveyor, indorsed, "copied for return," with a memorandum by him that there was an authority to make it, the lines of which survey are marked on the ground, is not a sufficient foundation to presume a warrant or authority. *Ib.*

TAXES.

1. Taxes due for seated lands are not a lien on real estate, but only a personal charge against the owner or occupant. *Burd v. Ramsey.* 109

TENANT FROM YEAR TO YEAR.

See EJECTMENT.

TENDER OF DEED.

See VENDOR AND VENDEE, 1, 2.

TESTATOR.

1. The devisee of unpatented land belonging to the testator has no right to call upon the personal estate of the testator to pay the purchase money and fees of patenting the land on taking out a patent. *Case of Keyzey executor of Keyzey.* 71

TITLE.

1. Where both plaintiff and defendant derive title from the same person who had been seised

of the premises, it is not necessary that the plaintiff should show a title out of the commonwealth. *Patton v. Goldsborough.*

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TRESPASS.

See ASSIGNMENT.

TURNPIKE ROADS.

See ROADS, 3, 4.

VARIANCE.

1. Where the writ states the plaintiff to be executor of A. who was surviving obligee with B. it is no variance, though the statement describe the bond as given to A. and B. executors of C. and the bond is in that form. *Crotzer v. Russel.* 78
2. After oyer, and pleas of performance and payment to an administration bond and verdict, it is too late to object to a variance between the bond and the form prescribed by the act of assembly, nor are unsubstantial variances material at any stage of pleading. *Carl v. The Commonwealth.*

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VENDOR AND VENDEE.

See AGENT. JUDGMENT, 5. DECLARATION. SHERIFF'S SALE.

1. If before the day for accepting a deed under a contract of sale, the vendee deny that he had made the purchase, and makes no other objection, that dispenses with the necessity of the tender of the deed by the vendor

on the day. *Hampton v. Speck-enagle.* 212

2. But though before the day the vendee deny that he had made the purchase, yet if the land is subject to incumbrances not declared at the time of sale, the vendor must satisfy the jury beyond a doubt, that he could and would have removed the incumbrances, or he is not entitled to damages. *Id.*

VERDICT.

See AMENDMENT, 1. JEOPAIL, 1, 2, 3. DECLARATION, 1, 3, 4. DEBT, 1.

WARRANT.

See SURVEY.

WARRANTY.

See COLLATERAL WARRANTY. GUARANTY.

WIDOW.

See FORMER RECOVERY, 1. ELECTION, 3. LEGACY, 4.

WRIT OF ERROR.

See ERROR.

WRIT.

See VARIANCE.

WITNESS.

See ARREST, 1.

1. Where a chose in action is equitably assigned, and suit is afterwards brought by the assignee, in the name of the assignor for his use, the assignor, if he have no interest is a competent witness for the plaintiff. *Fetterman v. Plummer's Administrator*. 20
2. The indorser of a promissory note is not a competent witness in a suit against the maker, to prove; that though drawn as a note of business and so discounted by the holder, it was really in its origin, a note for the accommodation of the indorser, especially if the indorser gave a bond of indemnity to the maker, when the note was given. *Bank of Montgomery v. Walker*. 229
3. A plaintiff on the record in an action of trespass *de bonis asportatis* may assign his interest and become a witness, but it seems, that a plaintiff in slander, assault and battery, or criminal conversation could not. *North v. Turner*. 244
- An assent to such assignment by absent persons will be presumed where it is made for a valuable consideration and is beneficial to them. *Ib.*
4. A plaintiff on record after assignment of his interest may be a witness, on paying sufficient to cover all the costs that have accrued or may accrue, without an express stipulation not to claim any return. *Ib.*
5. One of two joint obligors not summoned, is not a witness for the other who is summoned, to prove under notice of set off, a debt due from the plaintiff to the witness, though the witness is released by the defendant. *Henderson v. Lewis*. 379
6. A trustee of an insolvent debtor who releases all his claims as creditor, to the insolvent, is a good witness on his behalf in a suit in the insolvent's name for the use of his creditors. *Stoever v. Stoever*. 434



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